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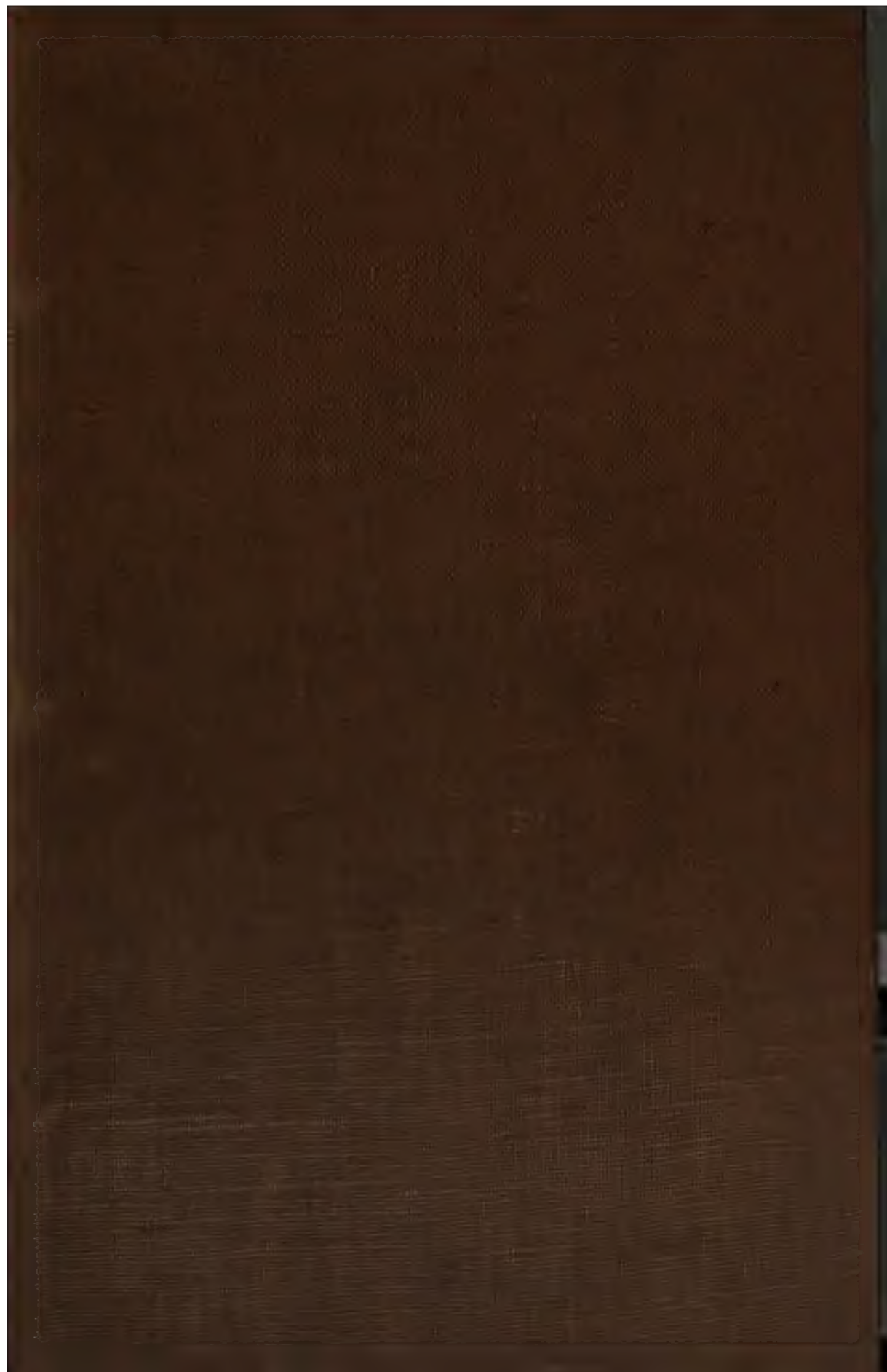
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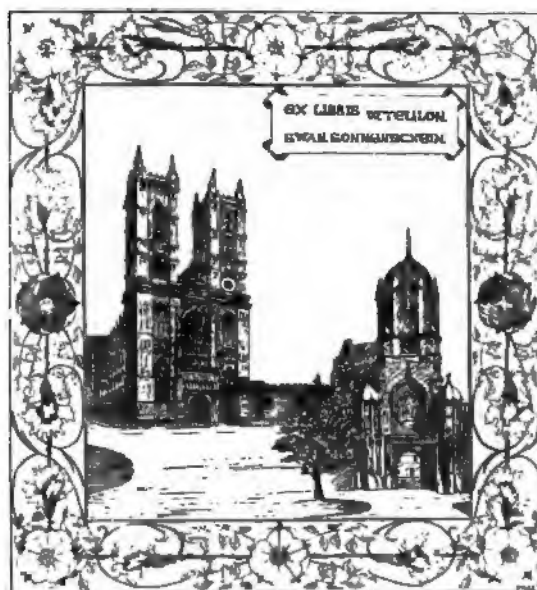
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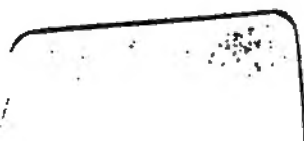
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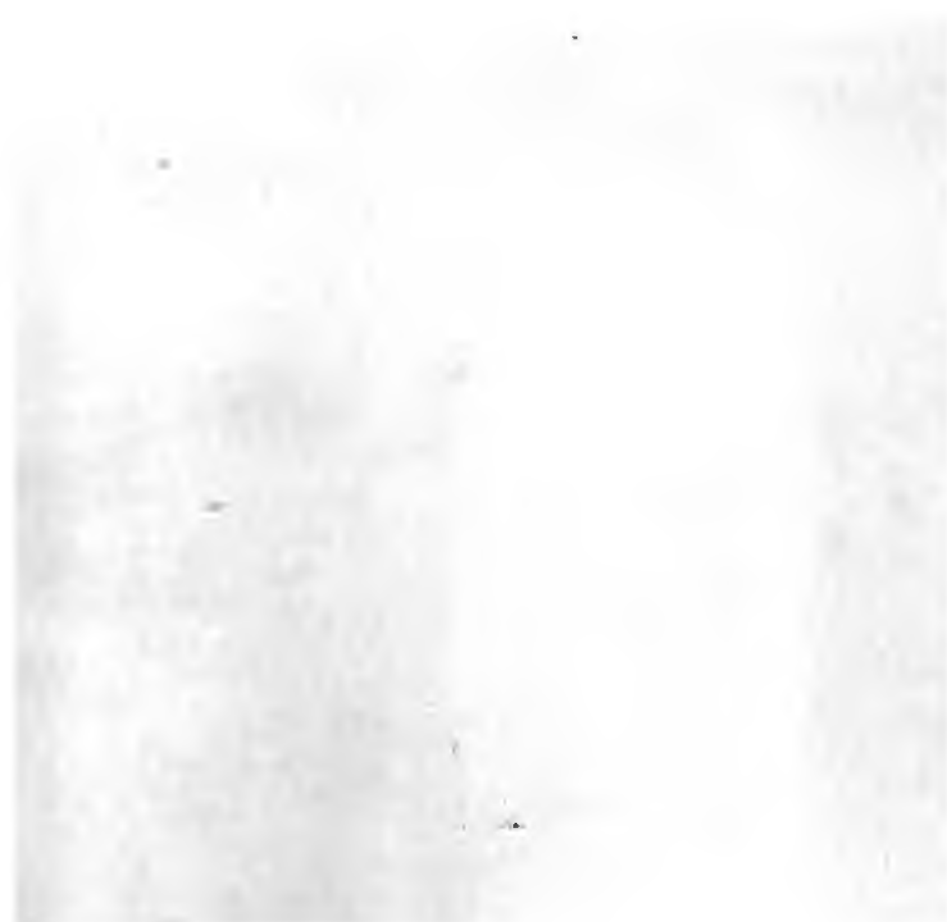
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A
PRACTICAL TREATISE
OF
THE LAW
OF
VENDORS AND PURCHASERS
OF
ESTATES.

BY SIR EDWARD B. SUGDEN,
HIS MAJESTY'S SOLICITOR GENERAL.

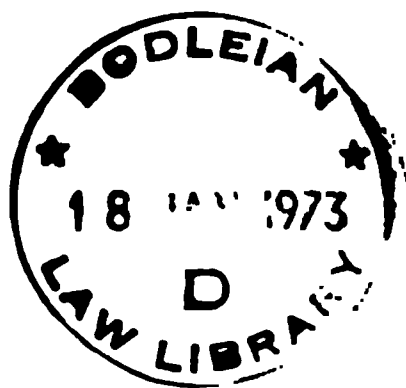
BONÆ FIDEI VENDITOREM, NEC COMMODORUM SPEM AUGERE, NEC
INCOMMODORUM COGNITIONEM OBSCURARE OPORTET.

Valerius Maximus, l. vii. c. 11.

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C O N T E N T S.

	Page
INTRODUCTION - - - - -	1

CHAP. I.

OF SALES BY AUCTION AND PRIVATE CONTRACT.

I. <i>Of the Auction Duty</i> - - - -	13
II. <i>Of Puffing</i> - - - -	20
III. <i>Of the Particulars and Conditions of Sale</i>	27
IV. <i>General Observations</i> - - - -	40
V. <i>Duty on Appraisements</i> - - - -	48

CHAP. II.

OF SALES UNDER THE AUTHORITY OF THE COURTS OF EQUITY.

SECT. 1. <i>Of the Proceedings from the Advertisements to the Conveyance</i> - - - -	49
SECT. 2. <i>Of opening the Biddings; and of rescinding the Contract</i> - - - -	59

CHAP. III.

OF PAROL AGREEMENTS AND PAROL EVIDENCE.

	Page
SECT. 1. <i>Of the Interests which are within the Statute</i>	68
SECT. 2. <i>Of the Form and Signature of the Agreement</i>	78
I. <i>What is a sufficient Agreement</i>	- ib.
II. <i>What is a sufficient Signature by the Party or his Agent</i>	- - - 92
III. <i>Who is an Agent lawfully authorized</i>	96
SECT. 3. <i>Of Parol Agreements not within the Statute</i>	100
I. <i>Sales by Auction before a Master</i>	- ib.
II. <i>Agreements admitted by Answer</i>	- 102
III. <i>Part Performance, &c.</i>	- - 106
SECT. 4. <i>Of the Admissibility of Parol Evidence to vary or annul written Instruments</i>	- 124
I. <i>Where there is not any Ambiguity</i>	- ib.
II. <i>Where there is an Ambiguity</i>	- 143
III. <i>Where a Term is omitted or varied by Mistake or Fraud</i>	- - 149

CHAP. IV.

OF THE CONSEQUENCES OF THE CONTRACT.

SECT. 1. <i>Of the Rule in Equity, that the Purchaser is entitled to the Estate from the Time of the Contract</i>	- - - - 162
SECT. 2. <i>Of Specific Performance</i>	- - - 182
I. <i>With respect to the Vendor</i>	- - ib.
II. <i>With respect to the Agreement itself</i>	- - - 191
SECT. 3. <i>Of the Remedies for a Breach of Contract</i>	205

CHAP. V.

OF THE CONSIDERATION.

	Page
SECT. 1. <i>Of unreasonable and inadequate Considerations - - - - -</i>	241
I. <i>Of unreasonable Considerations -</i>	ib.
II. <i>Of inadequate Considerations -</i>	242
III. <i>Of Inadequacy where the Conveyance is executed - - -</i>	244
IV. <i>Of Inadequacy where the Interest is reversionary - - -</i>	249
SECT. 2. <i>Of the failure of the Consideration before the Conveyance - - -</i>	254
I. <i>Of Loss by Fire, &c. - - -</i>	ib.
II. <i>Of the Death of the Person, for an Annuity upon whose Life the Estate was sold - - -</i>	257

CHAP. VI.

OF THE PARTIAL EXECUTION OF A CONTRACT WHERE A VENDOR HAS NOT THE INTEREST WHICH HE PRETENDED TO SELL; AND OF DEFECTS IN THE QUANTITY AND QUALITY OF THE ESTATE.

SECT. 1. <i>Where the Vendor has not the Interest which he sold - - -</i>	264
I. <i>In what Cases the Vendor may enforce a part Performance -</i>	ib.
II. <i>In what Cases the Purchaser may enforce it - - -</i>	277
SECT. 2. <i>Of Defects in the Quality of the Estate -</i>	283
SECT. 3. <i>Of Defects in the Quantity of the Estate -</i>	294

CHAP. VII.

OF THE TITLE WHICH A PURCHASER MAY REQUIRE.

	Page
I. <i>Of the Root of the Title</i> - - -	304
II. <i>Of the Production of the Lessor's Title</i>	305
III. <i>Of equitable and doubtful Titles ; of Fines to bar Dower ; and of equitable Jointures</i> - - - - -	314
IV. <i>Of equitable Recoveries where the Tenant to the Præcipe has the legal Estate</i> - - - - -	343
V. <i>Of a Title under the Statutes of Limi- tations</i> - - - - -	348

CHAP. VIII.

OF THE TIME ALLOWED TO COMPLETE THE CONTRACT.

SECT. 1. <i>Of Delays occasioned by the Neglect of either Party</i> - - - - -	363
SECT. 2. <i>Of Delays occasioned by the State of the Title</i> - - - - -	369

CHAP. IX.

OF THE ABSTRACT AND CONVEYANCE ; THE ASSIGNMENTS OF TERMS; ATTESTED COPIES AND COVENANTS FOR TITLE TO WHICH A PURCHASER IS ENTITLED; OF SEARCHING FOR INCUMBRANCES; AND OF RELIEF IN RESPECT OF INCUMBRANCES.

	Page
SECT. 1. <i>Of the Abstract and Conveyance</i> - -	385
SECT. 2. <i>Of Assignments of Terms</i> - -	391
I. <i>What Terms may be used upon an Ejectment</i> - - - -	ib.
II. <i>Of the Merger of Terms</i> - -	397
III. <i>At whose Expense to be assigned, and where Assignments may be dispensed with</i> - - - -	402
IV. <i>Of presuming a Surrender of Terms which have been assigned to attend the Inheritance</i> - - - -	407
V. <i>Of the Protection afforded by a Term assigned to attend</i> - - -	448
VI. <i>Where Terms attend the Inheritance by Implication</i> - - - -	458
VII. <i>Of the nature of a Term assigned to attend</i> - - - -	463
SECT. 3. <i>Of attested Copies</i> - - - -	466
SECT. 4. <i>Of Covenants for Title</i> - - - -	470
SECT. 5. <i>Of searching for Incumbrances</i> - -	476
I. <i>For Judgments</i> - - - -	ib.
II. <i>For registered Instruments and Annuities</i> - - - -	483

	Page
SECT. 6. <i>Of relief from Incumbrances</i> - - -	487
I. <i>Where the Purchase-money has not been paid</i> - - -	488
II. <i>Where it has been paid</i> - - -	ib.
<i>And therein of Defects in the Title to the Estate.</i>	

CHAP. X.

OF INTEREST AND COSTS.

SECT. 1. <i>Of Interest</i> - - -	501
I. <i>In what Cases payable</i> - - -	ib.
II. <i>At what Rate</i> - - -	516
SECT. 2. <i>Of Costs</i> - - -	519

CHAP. XI.

OF THE OBLIGATION OF A PURCHASER TO SEE TO THE APPLICATION OF THE PURCHASE-MONEY.

SECT. 1. <i>Of this Liability with Reference to real Estate</i> - - -	527
SECT. 2. <i>Of this Liability with Reference to Leasehold Estates</i> - - -	546

CHAP. XII.

OF THE VENDOR'S LIEN ON THE ESTATE SOLD, FOR THE PURCHASE-MONEY, IF NOT PAID.

I. <i>In what Cases raised</i> - - -	551
II. <i>Whether it extends to third Persons</i> -	559
III. <i>Against whom it will be enforced</i> -	566

CHAP. XIII.

OF THE CONSTRUCTION OF COVENANTS FOR TITLE.

	Page
SECT. 1. <i>Where they run with the Land</i> - -	570
SECT. 2. <i>Of their general Construction</i> - -	574
I. <i>To what and against whose Acts general and limited Covenants extend</i> -	575
II. <i>In what Cases restrictive Words extend to all the Covenants in the Deed</i>	582
III. <i>To what Remedy the Purchaser is entitled in case of a Breach</i> - -	592

CHAP. XIV.

OF THE PERSONS INCAPABLE OF PURCHASING.

SECT. 1. <i>Of Persons incapable of purchasing by the general Rules of Law</i> - - -	595
I. <i>An absolute Incapacity</i> - - -	ib.
II. <i>An Incapacity to hold, although an Ability to purchase</i> - - -	596
III. <i>An Incapacity to purchase, except sub modo</i> - - -	597
SECT. 2. <i>Of Purchases by Trustees, Agents, &c.</i> -	599
I. <i>Where avoided</i> - - -	ib.
II. <i>How they may be rendered valid</i> -	609
1. <i>Where the Trust is for Creditors</i> -	ib.
2. <i>Where it is for Persons sui juris</i> -	610
3. <i>Where it is for Persons not sui juris</i>	611
III. <i>Of the Remedy against the Trustee, &c.</i>	612

CHAP. XV.

OF JOINT PURCHASES; PURCHASES IN THE NAMES OF
THIRD PERSONS; AND PURCHASES WITH TRUST-
MONEY; AND OF THE PERFORMANCE OF A COVENANT
TO PURCHASE AND SETTLE AN ESTATE.

	Page
SECT. 1. <i>Of Joint Purchases</i> - - -	617
SECT. 2. <i>Of Purchases in the Names of Third Persons</i> - - -	624
I. <i>In the Names of Strangers</i> - -	ib.
II. <i>In the Name of a Child, Grandchild, or Wife</i> - - -	630
SECT. 3. <i>Of Purchases with Trust-Money</i> -	638
SECT. 4. <i>Of the Performance of a Covenant to pur- chase and settle an Estate</i> - -	640

CHAP. XVI.

OF THE PROTECTION AND RELIEF AFFORDED TO
PURCHASERS BY STATUTES, AND BY THE RULES OF
EQUITY.

SECT. 1. <i>Of Fraudulent and Voluntary Settlements; and Settlements with Powers of Reco- cation</i> - - -	646
I. <i>Of Fraudulent Settlements</i> - -	ib.
II. <i>Of Voluntary Settlements</i> - -	649
III. <i>Of their becoming valid by matter ex post facto</i> - - -	658
IV. <i>Of Settlements with Powers of Reco- cation</i> - - -	668
SECT. 2. <i>Of Protection from Charitable Uses</i> -	672
SECT. 3. <i>Of Protection from Acts of Bankruptcy</i> -	673
I. <i>Under the old Statutes</i> - -	ib.
II. <i>Under the Act of 46 George III.</i> -	675
III. <i>Under the Act of the 6th of the present King</i> - - -	679

	Page
SECT. 4. <i>Of Protection from Judgments and Recognizances</i> - - - -	682
I. <i>In the Case of Freehold Estates</i> - -	ib.
II. <i>In the Case of Leasehold Estates</i> -	688
III. <i>Of Recognizances</i> - - - -	693
SECT. 5. <i>Of Protection from unregistered Deeds, &c.</i>	ib.
I. <i>What Memorial is required by the registering Acts</i> - - - -	696
II. <i>What Deeds ought to be registered</i> -	701
III. <i>Of the Exceptions in the Acts</i> - -	ib.
IV. <i>Of the equitable Doctrine on the Acts in regard to Notice</i> - - - -	704
SECT. 6. <i>Of Protection from Acts of Papistry</i> -	708
SECT. 7. <i>Of Protection from Defects in Recoveries</i>	712
SECT. 8. <i>Of Protection from Defects in Sales for Land-Tax</i> - - - -	713
SECT. 9. <i>Of Protection from Crown Debts</i> - -	721
SECT. 10. <i>Of Equitable Relief and Protection</i> -	722
I. <i>Where the Purchaser has not Notice</i> -	ib.
II. <i>The Effect of Notice</i> - - - -	732

CHAP. XVII.

OF NOTICE.

I. <i>Of actual Notice</i> - - - -	740
II. <i>Of Constructive Notice</i> - - - -	742
III. <i>Of Evidence of Notice</i> - - - -	761

CHAP. XVIII.

OF PLEADING A PURCHASE - -	766
----------------------------	-----

APPENDIX OF MS. CASES, &c.

	Page
No. 1. } <i>Notices under the Auction Duty Acts</i>	- 773
No. 2. }	
No. 3. }	
No. 4. <i>Conditions of Sale</i> - - - -	- 774
No. 5. <i>Agreements to be executed at a Sale by Auction</i>	777
No. 6. <i>Agreement for Sale by Private Contract</i> -	778
No. 7. <i>Bratt v. Ellis</i> - - - -	- 779
No. 8. <i>Jones v. Dyke</i> - - - -	- 781
No. 9. <i>Wyatt v. Allen</i> - - - -	- 782
No. 10. <i>Morshead v. Frederick</i> - - - -	- ib.
No. 11. <i>Ex parte Tomkins</i> - - - -	- 784
No. 12. <i>Observations on the Annuity Act, and on raising the legal Rate of Interest</i> -	785
No. 13. <i>Coussmaker v. Sewell</i> - - - -	- 795
No. 14. <i>Clay v. Sharpe</i> - - - -	- 796
No. 15. <i>Belch v. Harvey</i> - - - -	- 798
No. 16. <i>The King v. Smith</i> - - - -	- 800
No. 17. <i>Attorney-General v. Lockley</i> - - - -	- 808
No. 18. <i>Brett v. Sawbridge</i> - - - -	- 811
No. 19. <i>Forshall v. Coles</i> - - - -	- 817
No. 20. <i>Burton and others v. Todd, } Todd v. Gee and others }</i> - - - -	- 818
No. 21. <i>Rea v. Williams</i> - - - -	- 820
No. 22. <i>Lechmere v. Lechmere</i> - - - -	- 821
No. 23. <i>Fairfield v. Birch</i> - - - -	- 823
No. 24. <i>Sloane v. Cadogan</i> - - - -	- 825
No. 25. <i>Bury v. Bury</i> - - - -	- ib.

INDEX - - - - -	- 839
-----------------	-------

INDEX TO CASES,

CITED OR INTRODUCED.

Note, “*v.*” follows the name of the plaintiff; “*and*,” the name of the defendant.

The Cases printed in italics are either cited or stated from MSS. or have been examined with the Register’s book, or searched for without success.

A.	Page		Page
ABBOT <i>v.</i> Gibbs -	527	Adams <i>v.</i> Fairbain -	142
— <i>and</i> Rex -	14	— <i>and</i> Greenaway -	218
— <i>and</i> Jebb -	528	— <i>and</i> Hill -	455
Abdy <i>v.</i> Loveday -	725	— <i>v.</i> Taunton -	545
Abel <i>and</i> Doe -	240	Adams <i>v.</i> Weare -	241. 541
Abingdon (Lord) <i>and</i> Child, 508.	516	Adamsom <i>and</i> Stevens -	286
Abney <i>and</i> Merry -	743	Adcock <i>and</i> Mertens -	36
Abraham <i>v.</i> George -	678	Adderly <i>and</i> Dixon -	192
Abrahams <i>and</i> Fuller -	27	Addison <i>v.</i> Dawson -	598
Abrey <i>and</i> Wood -	249. 251	Adkinson <i>and</i> Hall -	724
Aburrow <i>and</i> Bennett -	830	Advocate General <i>and</i> Walker, 17	
Acherley <i>v.</i> Acherley -	625	Agar <i>v.</i> Macklew -	254
Ackerman <i>and</i> Brand -	762	Ailsbie <i>and</i> Holmes -	469
Acland <i>v.</i> Gainsford -	45.	Alam <i>v.</i> Jourdon -	763
	510. 516	Alcock <i>and</i> Jeudwine -	207
Acton <i>and</i> Cage -	399, 400	— <i>and</i> Knollys -	175
— <i>v.</i> Pierce -	202	Aldrich <i>v.</i> Cooper -	562
Adams <i>and</i> Daniel, 97. 188. 190.	196	Aldridge <i>and</i> Floyd -	166
Adams <i>and</i> Davids -	114, n.	— <i>and</i> Mesnard -	29
Adams <i>and</i> Dickenson -	114	— <i>and</i> Nelson -	40
		Alexander <i>and</i> Crockford, 164.	206

	Page
Attenborough and Williams	55. 60
Attersoll and Blake - -	789
Attorney-General v. Backhouse	615, n. 755
—— v. Bagg - -	633
—— v. Cast Plate Glass Com-	
pany - -	145
—— and Christie -	18. 20
—— v. Day -	58. 102. 180
—— v. Lord Dudley -	605
—— v. Forster -	149
—— v. Gower -	278. 742. 769
—— v. Griffith -	615 n.
—— v. Parker -	149
—— v. Sands, 401. 451, 452. 459.	463. 465
Attorney-General v. Scott, 455, n.	
—— v. Taylor -	18
—— and Thruxton, 463, 464, 465	
—— v. Vigor -	173
Atwood and Moth -	448
Aubrey v. Fisher -	33
Auriol and Mills -	593
Austen and Davies -	728, 729
—— v. Halsey -	563
Austin and Crowder -	24
Aveling v. Knipe -	617
Austwick and Maddeford -	244
Awbrey v. Keen -	488
Ayers and Fain -	593
Ayerst and Boys -	82
Aylesford's (Earl of) case -	108
Ayliffe v. Murray -	610

B.

Back v. Andrews	-	-	636
—— v. Kett	-	-	172
—— and Turner	-	•	725
Backhouse and Attorney-Ge-			
neral	-	-	615 n. 755

	Page
Backhouse <i>and</i> Bedford	- 704
Baddall <i>and</i> Gibbons, 554,	555, 556
Baden v. Earl of Pembroke,	163. 464
Bage, <i>ex parte</i> - -	599. 609
Bagenal <i>and</i> Whaley -	90. 108
Bagg <i>and</i> Attorney-General,	633
Baglehole v. Walters - -	289
Baikie v. Chandless - -	486
Bailey v. Ekins - - -	533
Bailey <i>and</i> Hays, 266. 319.	393. 444. 520
—— v. Tyrer - - -	383
Baillie <i>and</i> Ashley -	742. 744
—— v. Chaigneau - -	60
Bailiffs, &c. of Tewkesbury v.	
Bricknell - - -	149
Baily <i>and</i> Lamas -	622, 623
—— <i>and</i> Stent - - -	255
—— <i>and</i> Stevens - - -	182
Bainbridge <i>and</i> Bruce -	523
Bainton <i>and</i> Lambert -	603
Baker v. Child - - -	186. 188
Baker <i>and</i> Cuthbert -	267. 536
—— v. Dibbin - - -	331
Baker v. Morgan - - -	51
—— v. Paine - - -	160
—— <i>and</i> Smith - - -	625
—— <i>and</i> Squire - - -	242
—— <i>and</i> Taylor (1 Dan. 71)	753
—— <i>and</i> Taylor (5 Price 306)	755
Baldey v. Parker - - -	270
Baldwin v. Boulter - -	260
—— <i>and</i> Cane - - -	39. 316
—— <i>and</i> Echliff - - -	206
—— <i>and</i> Lloyd - - -	527. 529
—— v. Rochfort - - -	252
Balfe <i>and</i> Kine - - -	108
Balfour v. Welland - -	531
Balgney v. Hamilton - -	639

INDEX TO CASES.

xix

	Page		Page
Ball v. Bumford - - -	657	Barrymore (Lord) and Barry -	97
— and Gordon - - -	211	Barstow v. Kilvington - -	155
— and Symonds - - -	101	Bartlett v. Downes - - -	440
Ballard and Crowe - - -	610	— v. Pickersgill, 106. 625. 629	
— and Hercy - - -	354	— v. Tuchin - - -	371
Bally v. Wells - - -	571	Barton and Buckland - - -	830
Balmanno v. Lumley - - -	211	— v. Fitzgerald - - -	584. 588
Banbury (Earl of) and Bisco	756	— and Richards, 224. 385. 388.	
Banes and Croyston - - -	102		477
Banks v. Sutton - - -	455	Bartram and Hudson - - -	382
Barber and Davy - - -	501. 508	Bartch and Kitchin - - -	149
— v. Gamson, App. No. 12.		Barwick and Say - - -	193
— and Lea - - -	78	Bascoi v. Serra - - -	757
Barchard and Low - - -	245	Baskerville and Dickinson, 114, n.	
Barclay v. Raine - - -	469	Basket v. Pierce - - -	391
Barker and Brampton - - -	769	Basset v. Nosworthy - - -	723. 769
— v. Duke of Devon - - -	528	— and Upton - - -	647
— v. Hill - - -	163	Bateman and Cox - - -	638
— v. Holford - - -	53	— v. Phillips - - -	78. 227
— v. Harper - - -	56	— and Stephens - - -	245
— and Preston - - -	60	Bateman v. Shore - - -	620, n.
Barkley and Jones - - -	230	Bath (Earl of) v. Sherwin - -	203
Barksdale v. Morgan - - -	301	Battaly and Edlin - - -	730
Barnard (Lord) and Vane, 488.	743	Battersbee v. Farrington - -	656
Barnardiston (Sir J.) v. Lin-		Baugh v. Price - - -	248, 249. 730
good - - -	247	Bawden and Right - - -	631
Barnes v. Crowe - - -	172	Baxter v. Conolly - - -	341
— and Freeman - - -	391	— and Earl - - -	312
— and Walker - - -	236	— v. Lewis - - -	231, 232
Barnfather v. Jordan - - -	597	Baylis v. Manning - - -	304, n.
Barns v. Canning - - -	745	— v. Newton - - -	634
Barnston and Stackhouse - -	355	Bayly v. Schofield - - -	678
Barnwell v. Harris, 265, 266. 304.		Bayne and Trimmer - - -	563
	318. 324. 327	Baynham v. Guy's Hospital	148
Barret v. Blake - - -	52	Beable v. Dodd - - -	831
— v. Gomeserra - - -	108. 242	Beake and Wiseman - - -	248
Barrington v. Horne - - -	188	Beane and Ithell - - -	547
Barrow and Hilton - - -	217	Beard and Chandler - - -	322
Barry v. Lord Barrymore - -	97	— and Right - - -	234
— and Conran - - -	61, n.	Beard and Westcott - - -	814, n.
— and Phillimore - - -	94, 95. 98	Beardsham and Davie, 162. 165. 169	

	Page		Page
Beatniff v. Smith -	706	Bennet <i>ex parte</i> , 599, 600, 603.	614
Beaty v. Beaty -	94, n.	Bennett v. Harnell -	51
Beauclerk (Lord) <i>and</i> Cant -	746	— <i>and</i> Lawes -	177
Beaumont v. Bramley -	156	— <i>and</i> Hughes -	591
— v. Dukes -	31	— <i>and</i> Kelsall -	769
— <i>and</i> Needham -	647	— <i>and</i> Moore -	756
<i>Beaurain and Turner</i> , 224. 265,	266, n.	— v. Lord Tankerville -	176
<i>Beazley and Welford</i> , 88. 94. 759		— v. Wornack -	32
Bechinall v. Arnold -	724	Benson <i>and</i> Doe -	127
Beckett <i>and</i> Chater -	78	— <i>and</i> Turton -	729
— v. Cordley -	759	Benyon v. Collins -	528
Beckford v. Beckford -	630	Berkeley v. Dauh -	216
— v. Wade -	349. 356	— <i>and</i> Weston -	770
Bedford v. Backhouse -	704	Bernal v. Donegal -	247
— (Earl of) <i>and</i> Clare -	726	— <i>and</i> Wood -	266. 375
— (Duke of) <i>and</i> Charle-		Berney v. Pitt -	247
wood -	71, n. 88. 97	Berry v. Young, 34. 42. 359. 365.	466. 468
Bedwell <i>and</i> Townley -	178. 509	Best v. Stamford -	459
Beech <i>and</i> Taylor -	107	Betesworth (Dr.) v. Dean <i>and</i>	
Beechey <i>and</i> Pennington -	770	Chapter of St. Paul's	202
Beete v. Bidgood -	516	Bethill <i>and</i> Floyd -	301
<i>Belch v. Harvey</i> -	355	Bethune v. Farebrother -	221
Bell v. Cundall -	724	Bettel <i>and</i> Webb -	232
— <i>and</i> Hutchinson -	5	Bevant v. Pope -	334
— v. Howard -	140. 368	Beversham <i>and</i> Tyler -	299
— v. Phyn -	620. n.	Bevill's case -	354
— <i>and</i> Scott -	657	Bevis <i>and</i> Whitchurch, 91. 104.	107, 108
<i>Bellamy v. Liversidge</i> -	342	Bexwell v. Christie -	20
Bellasis (Lady) v. Compton -	628	Bickerstaff <i>and</i> Hayes -	576
Bellew v. Russell -	602	Bickerton v. Burrell -	221
Bellringer <i>and</i> Rex -	149	Bicknell <i>and</i> Evans, 406. 427. 457.	726. 763.
Belworth v. Hapell -	264	Biddulph v. St. John -	707. 760.
Bennet v. Aburrow -	830		764
— <i>and</i> Allen, 78, 79. 86. 93. 98		Bidgood <i>and</i> Beete -	516
<i>Bennet and Ardesoife, or</i>		Bidlake <i>and</i> Arundel -	555, n.
<i>Wilson</i> -	165	Billing <i>and</i> Farrer -	316
Bennet College v. Carey, 45. 198.	520	Bill <i>and</i> Humble -	528. 546. 549
— v. Mayhew -	638	Bingham v. Bingham -	238
— v. Musgrove -	662		

INDEX TO CASES.

xxi

	Page		Page
<i>Binion</i> (Sir G.) <i>v.</i> <i>Stone</i>	- 633	<i>Blake and Reynolds</i>	- - 57
<i>Binks and Appleton</i>	- - 47	<i>Blake's case</i>	- - - 357
<i>Binks v. Lord Rokeby</i>	- 273. 519.	<i>Blakeston v. Martyn</i>	- - 483
	527	<i>Blakey v. Porter</i>	- - 227
<i>Binstead v. Coleman</i>	- 108. 125	<i>Bland and Doe</i>	- - - 145
<i>Birce v. Bletchley</i>	- - 92	<i>Blandford and Carpenter</i>	- 362
<i>Birch v. Blagrove</i>	- - 634	<i>Blandist and Miller</i>	- 110. 123
<i>Birch and Fairfield</i>	- 655, App.	<i>Blankley v. Winstanley</i>	- 149
	No. 23.	<i>Blemerhasset v. Peirson</i>	- 137
<i>Birch and Fox</i>	- - - 215	<i>Blennerhasset v. Day</i>	- - 603
— <i>v.</i> <i>Haynes</i>	- - - 212	<i>Bletchley and Birce</i>	- - 92
— <i>and Watson</i>	- - 61	<i>Bliss v. Collins</i>	- - - 318
— <i>v.</i> <i>Wright</i>	- - - 237	— <i>and Vancouver</i> , 10.	216.
<i>Birch and Wood</i>	- - 621		272. 519, 520
<i>Birkhead and Wortley</i>	- 748	<i>Blogg and Holmes</i>	- - 597
<i>Birt and Meder</i>	- - - 770	<i>Bloodworth and Radford</i>	- 675
<i>Bisco v. Earl of Banbury</i>	- 756	<i>Blore v. Sutton</i>	- 84. 94. 218
<i>Biscoe v. Bret</i>	- - - 211	<i>Blount v. Blount</i> , 504.	508. 516
— <i>and Arnot</i>	- - - 764	<i>Blosse v. Clanmorris</i>	- - 314
— <i>v.</i> <i>Perkins</i>	- - - 733	<i>Blundell v. Brettargh</i>	- - 253
— <i>v.</i> <i>Wilks</i>	- - - 521	<i>Blyth v. Elmherst</i>	- - 212
<i>Blacket v. Langlands</i>	- - 767	<i>Blythmore and Parker</i>	- 772
<i>Blackburn v. Gregson</i> , 555.	559.	<i>Boakes and Kingdome</i>	- 763
	567	<i>Boatwright and Cabbage</i>	- 548
— <i>v.</i> <i>Scholes</i>	- - - 41	<i>Boardman v. Mostyn</i>	- - 120
— <i>v.</i> <i>Stace</i>	- - - 213	<i>Bodington and Wilker</i> , 417.	749
<i>Blackstone and Lavender</i> , 657.	669	<i>Bodmin v. Vendebendy</i> , or	
<i>Blackwell and Boyer</i>	- 61. 269	— <i>Rotherham</i>	- - 455. 769
<i>Blackwood and Macartney</i>	- 515	<i>Boehm v. Wood</i>	- 211. 234. 382
<i>Blades v. Blades</i>	- - 706	<i>Bogan and Sir C. Shovel</i>	- 294
— <i>and Winter</i>	- - 502	<i>Bolingbroke's (Lord) case</i>	- 283
<i>Blagden v. Bradbear</i> , 80.	84. 86,	<i>Bolton (Lord) and Deverel</i> , 305.	
	87, 88. 98. 101. 106		310
<i>Blagrove and Birch</i>	- - 634	<i>Bond and Chapman</i>	- 464, 465
<i>Blake v. Attersoll</i>	- - 789	— <i>v.</i> <i>Hopkins</i>	- - 358
— <i>and Barrett</i>	- - 52	— <i>v.</i> <i>Kent</i>	- - - 553
— <i>v.</i> <i>Sir Edward Hunger-</i>		— <i>and Wright</i>	- - 210
— <i>ford</i>	- - - 723	<i>Bonham, or Thompson, and</i>	
— <i>and D'Arcy</i>	- 445, n.	— <i>Williams</i>	- - - 378
— <i>and Earl of Maccles-</i>		<i>Bonner v. Johnston</i>	- 214, 215
— <i>field</i>	- - - 64	<i>Bonnett v. Sadler</i>	- - 201

	Page		Page
Bonney v. Ridgard, 547, 548, 549		Bradbear and Blagden, 80. 84. 86, 87, 88. 98. 101. 106	
Boone v. Eyre - - -	362	Bradley and Brookfield -	60
Boore and Marquis of Hert- ford - - -	376	— and Westcott -	830
Booth and Cook - -	148	Bradshaw v. Bradshaw -	214
— and Whale - -	549	Bradshaw v. Midgeley -	516
Boothby v. Walker -	214	Bradstreet and Shannon, 122. 191	
Boston and the King -	106. 629	Bragg and Calton -	513
Boswell v. Mendham -	326	Braithwaite and Howard -	97
Bosworth and Stratford -	82	Brakespear v. Innes -	721
Boteler v. Allington -	186	Bramah and Wheeler -	46
Botelers and Hearne -	554	Bramby v. Teal -	215
Botting v. Martin -	73	Bramley v. Alt -	23
Bottomley v. Lord Fairfax -	456	— and Beaumont -	156
Boughton v. Jewell -	467	Bramton v. Barker -	769
Boulter and Baldwin -	260	Brand v. Ackerman -	762
Bourne and Hunt -	349	Brandling v. Ord -	738
Bowie's (Sir Ralph) case -	656	Brandon and Flint -	192
Bowden and Jones -	292	Brandt and Dews -	245. 248
Bowen and Morris -	47. 79	Brasier and Lechmere -	57. 374
Bower and Allan -	119	Bratt v. Ellis -	40. 222. 224
Bowerbank and De Haviland, 513		Bray and Lowndes -	233. 316
Bowers v. Cator - -	108	Braybroke (Lord) v. Inskip, 325. 545. 726	
Bowes v. Heaps - -	249	Brayne and Mollett -	73
— and Lady Strathmore (Term Rep.) - -	172	Breach and Doe -	234
— and Lady Strathmore (Vez. jun.) - -	457	Brebner and Paton -	280
Bowles v. Atkinson -	293	Bree v. Holbech -	489. 498
Bowles v. Rogers, 36. 162. 377. 567		Bret and Biacoe -	211
— v. Stewart -	7. 8. 358	Brett v. Sawbridge -	464
Bowyer v. Bright -	271	Breton (Le) and Hargrave -	742
Boydell v. Drummond -	787	Brett v. Marsh -	500
Boyer v. Blackwell -	61. 269	Brettargh and Blundell -	253
Boys and Ayerst - -	82	Brewer and King -	657
— and Digs - -	745	Bricknell and Bailiffs, &c. of Tewkesbury -	149
Brace v. Duchess of Marl- borough -	417. 482. 770	Bridger v. Rice -	196
Bracebridge v. Cook -	400	Bridges and Kingdome -	636
— v. Heald - -	68, n.	— v. Robinson -	511
		Bright and Bowyer -	271
		— and Wall -	177

INDEX TO CASES.

xxiii

	Page
Brightwen <i>and</i> Doe -	324
Brig's case -	198. 222. 488
Bringloe <i>and</i> Mallom -	598
Brisco <i>and</i> Huddleson -	81, 82
Bristow <i>and</i> Waddington -	76
Brockett <i>and</i> Oxwick -	299
Brockhurst <i>and</i> Whitbread -	108
Brockwell <i>and</i> Winter -	73
Erodie <i>v.</i> St. Paul -	84
Brook <i>v.</i> — -	209
— Earl <i>v.</i> Bulkeley -	733
Brooke <i>and</i> Parker -	761
Brookes <i>v.</i> Lord Whitworth, 216,	217
Brookfield <i>v.</i> Bradley -	60
Brooks <i>v.</i> Day -	486
— <i>v.</i> Snaith -	60
— <i>and</i> Sowerby -	749
Broome <i>v.</i> Monck, 165. 170, 171.	180, 181
Brotherton <i>v.</i> Hatt -	742
Broughton <i>v.</i> Conway -	586
Brown <i>v.</i> Brown -	583
— <i>and</i> Burnell, 11. 276, 277.	518
— <i>v.</i> Carter -	659
— <i>and</i> Chapman -	150, n.
— <i>and</i> Elliot -	619
— <i>and</i> Evans -	245
Brown <i>v.</i> Frost -	206
Brown <i>and</i> Fain -	194
Browne <i>v.</i> Fenton, 4. 38. 43. 267.	285
Brown <i>v.</i> Gibbs -	455
Brown <i>v.</i> Kelty -	214, 215
Brown <i>and</i> Goodrick -	348
— <i>v.</i> Jones -	651. 656
— <i>and</i> Langley -	160
— <i>v.</i> Raindle -	187
— <i>and</i> Ryle -	248
Brown <i>and</i> Robson -	165

	Page
Brown <i>and</i> Street -	227
— <i>v.</i> Southhouse -	512
— <i>and</i> Temple, 307. 385, n	
Browne <i>and</i> Kenny -	731. 758
— <i>v.</i> Odea -	730
Browning <i>and</i> Burdon -	106
— <i>v.</i> Wright -	153. 574. 585
Brownlow (Lord) <i>and</i> Frank-	
lin -	163. 317
Bruce <i>v.</i> Bainbridge -	523
— <i>v.</i> Rogers -	245
— <i>and</i> Warwick -	77
Brushfield <i>and</i> Howes -	581
Bruyn's (Sir John) case -	301
Brydges <i>v.</i> Duchess of Chan-	
dos -	167, n.
— <i>and</i> Philips -	347
Brydges <i>and</i> Stephens -	401
Brymer <i>and</i> Washington -	828
Bubb's case -	163
Buck <i>v.</i> Lodge -	214
Buckhouse <i>v.</i> Crossby, 78. 80. 139	
Buckhurst's (Lord) case -	472
Buckingham (Marquis of)	
— <i>and</i> Curtis -	206
— (Earl of) <i>v.</i> Drury, 338,	339, n. 340
— (Duke of) <i>and</i> Philips, 201	
— <i>and</i> Smallcomb -	688
Buckland <i>v.</i> Barton -	830
— <i>and</i> Floyd -	108
Buckle <i>and</i> Cannel -	202
— <i>v.</i> Mitchell -	663, 664
Buckley <i>and</i> Hill, 195, 196, 295.	298
Buckmaster <i>v.</i> Harrop, 99. 161.	117. 180
Bucknell <i>and</i> Weakley -	645
Bucks (Earl of) <i>v.</i> Drury, or	
Drury <i>v.</i> Drury, 338, 339, 340	
Budgin <i>and</i> Christ's Hospital, 637.	

	Page		Page
<i>Bulkeley and Earl Brook</i>	- 733	<i>Burt and Doe</i>	- - - 143
<i>Bull v. Allen</i>	- - - 217	<i>Burting v. Stonnard</i>	- - - 546
<i>Buller v. Buller</i>	- - - 179	<i>Burton and Scorbrough</i>	- 519
<i>Buller and Mortlock</i> , 58. 97. 191.		<i>Burton v. Todd</i> , 510; App. No. 20.	
196, 197. 242. 244. 281		<i>Burwell and Wyat</i>	- - 708
<i>Buller v. Waterhouse</i>	- - 669	<i>Bury v. Bury</i>	- 743. 756; App.
<i>Bullock v. Bullock</i>	- - 323		No. 25.
— <i>and Ferne</i>	- - 110. 123	<i>Bushell v. Bushell</i> , 704. 706. 749	
— <i>and Rex</i>	- - 678	<i>Butcher v. Butcher</i> (Ves. jun.) 115	
— <i>v. Sadlier</i>	- - 647. 769	— <i>v. Butcher</i> (New Rep.) 147	
— <i>v. Thorne</i>	- - 670	— <i>v. Stapely</i>	- - 108. 741
<i>Bumford and Ball</i>	- - 657	<i>Bute (Earl of) and Sir John</i>	
<i>Burdett v. Wright</i>	- - 429	Eden	- - - 148
<i>Burdon v. Browning</i>	- - 106	<i>Butler and Lawrenson</i> , 197, n. 281	
— <i>v. Kennedy</i>	- - 478	— <i>v. Swinnerton</i>	- - 578
<i>Burg's (Lady) case</i>	- - 659	— <i>v. Capel</i>	- - 790
<i>Burgess v. Wheate</i>	- - 260	<i>Butterwick and Rob</i>	- - 156
<i>Burgh v. Francis</i>	- - 417. 728	<i>Buxton v. Cooper</i> , 4. 195. 241	
— <i>v. Wolf</i>	- - 725	<i>Buxton ex parte</i>	- - 600, n.
<i>Burgis and Rawlins</i>	- - 170	<i>Byrn and Price</i>	- - 605. 616
<i>Burke v. Crosbie</i>	- - 51	<i>Byrne and Dillon</i>	- 693, n.
<i>Burke v. Dawson</i>	- - 664	<i>Byron and Creswell</i>	- - 339
<i>Burkitt v. Randall</i>	- - 123	— (Lord) <i>and Deardon</i>	- 444
<i>Burlase (Sir John) v. Cooke</i>	- 724		
<i>Burnaby v. Griffin</i>	- 186. 521		
<i>Burnham and Smith</i>	- 366. 374		
<i>Burnell v. Brown</i> , 11. 276. 277.			
	518		
<i>Burnett v. Lynch</i>	- - 33		
<i>Burrell and Bickerton</i>	- - 221		
<i>Burrell and Coverley</i>	- - 265		
<i>Burrell's case</i>	- - 648		
<i>Burrough v. Martin</i>	- - 10		
— <i>v. Skinner</i>	- - 42		
<i>Burrough's case</i>	- - 637		
<i>Burroughs v. Elton</i>	- - 620		
— <i>v. Oakley</i>	- - 213, 214		
<i>Burroughs and Saunders</i>	- 604		
<i>Burrowes v. Lock</i> , 7. 11. 242. 727			
<i>Burrowes and Lees</i>	- - 48		
— <i>and Walker</i>	- - 636		

C.

<i>Cadman v. Horner</i>	- 192. 244
<i>Cadogan (Lord) and Lord</i>	
Montford	- - - 730
<i>Cadogan and Sloane</i>	- - 658
<i>Cage v. Acton</i>	- - 399, 400
<i>Calcraft v. Roebuck</i> , 10. 274. 276.	
	502. 516. 524
<i>Calland and Rose</i>	- 272. 314
<i>Callaway v. Ward</i>	- - 162
<i>Calthorp v. Hayton</i>	- - 577
<i>Calton v. Bragg</i>	- - 513
<i>Calverley v. Williams</i>	- 299. 521
<i>Calvert and Doe</i>	- - 324
<i>Camden (Earl) and Garrick</i>	- 55
<i>Camelford (Lord) and Smith</i> , 625	

INDEX TO CASES.

XXV

Page	Page
Camfield v. Gilbert, 221. 224, 225	Caruthers v. Caruthers, 339, 340
Cammeyer and Rucker, 97, 98	Carwarden and Parry - - 662
Campbell v. Campbell - - 466	Cary v. Cary - - - 606
Campbell v. Lewis - - 570	Caryll and Hayes - - 368
— and Lewis - - - ib.	Casberd v. Ward - 449, n. 568
— v. Walker - 599, 605, 612	Cason v. Round - - 770
Campion v. Cotton - - 637	— and Stadd - - 764
Cane v. Lord Allen - 603, 611	Cass v. Rudele - - - 255
— v. Baldwin - - 39, 316	— v. Waterhouse - 90, 299
Cann v. Cann - - 317, 323	Casamajor v. Strode, 58, 318, 319
Cannel v. Buckle - - 202	Cast Plate Glass Company
Canning and Barns - - 745	and the Attorney-Gener-
Cant v. Lord Beauclerk - 764	ral - - - - 145
Capel v. Butler - - - 790	Castle and Howard - 21, 23
Capel v. Girdler, 166, 167, 459,	Caswell, <i>ex parte</i> - - 830
460	Catesby and Mountford - 575
Capp v. Topham - - 17, 19	Cator and Bowers - - 108
Capper and Mortimer, 243, 258,	Cator and Jackson - - 159
262	— v. Earl of Pembroke - 499
Card v. Jaffray - - - 83	Cavan (Lady) v. Pulteney - 581
Carding and Lord Verney - 733	Cave and Payne - - - 38
Careless and Stewart - - 105	Cavendish v. Worsley - - 185
Carey and Bennet College, 45,	Cazenove and Hall - - 360
198, 526	Chaigneau and Baillie - - 60
Carleton and Lowther, 724, 738,	Chalie and Garthshore, 339, 640
744	Chamberlain and Cox - 520
Carlisle (Earl of) and Lech-	Chamberlain and Fell, 106, 127,
mere - 641, 642, 643,	629.
Carpenter v. Blandford - 362	Chamberlaine v. Chamber-
— and Sorrell, 745, 747, 748	laine - - - - 145
Carr, <i>ex parte</i> - - - 5	— and Phillips - 150, n.
— and Hill - - - 185	Chambers v. Griffiths - 269, 270
— and Wedderburne - 97	Champion v. Plummer - 83
Carril and Lowther - - 95	Champneys and St. John - 786
Carroll and Savage, 109, 121, 122,	Chandelor v. Lopus - - 3
171, 180, 639	Chandler v. Beard - - 322
Carter and Brown - - 659	Chandless and Baikie - - 486
— v. Horne - - - 620	Chandos (Duchess of) and
— v. Pritchard - - 767	Brydges - - - 167, n.
— and Williams - - 198	— (Duke of) v. Talbot - 33
Cartwright and Denn - - 733	Chaplain v. Southgate - 576

	Page		Page
Chaplin <i>and</i> Tatem -	571	Christie v. Attorney-General, 18.	20
Chapman v. Bond -	464. 465	— <i>and</i> Bexwell -	20
— v. Brown -	150, n.	Christ's Col. v. Widdrington, 764	
— v. Emery -	651. 660	— Hospital v. Budgin -	637
— v. Gibson -	725	Church v. Legeyt -	220
— v. Tanner -	551	Churchill, <i>ex parte</i> -	600
Charles v. Andrews -	241. 338.	— v. Grove -	478. 748
	551	Churchman v. Harvey -	832
Charlton v. Low -	455. 465. 723	Chute <i>and</i> Selby -	577
Charlewood v. the Duke of		Clanmorris <i>and</i> Blosse -	314
Bedford -	71, n. 88. 97	Clapham <i>and</i> Wilson -	510
Charlwood v. Morgan -	304, n.	Clare v. Earl of Bedford -	726
Charnells <i>and</i> Siddon -	724	Clare v. Clare -	813
Chater v. Beckett -	78	Clark <i>and</i> Fullagar -	211
Cheek v. Jeffries -	788	— v. Hackwell -	110. 123
— <i>and</i> Watkins -	534	— <i>and</i> Kirk, or Heisier -	659
Cherry <i>and</i> Ferrara, 660. 738.	756	Clark <i>and</i> Armiger -	205
Chesney's case -	402	— v. Elliott -	213. 215.
Chesterfield v. Janssen -	248	— <i>and</i> Gibson -	212. 214. 215
Cbetham v. Grugeon -	61	— <i>and</i> Goodwin -	234
Chetwynd <i>and</i> Sutton -	666	— v. Grant -	129
Cheney's (Lord) case -	143	— <i>and</i> Jervoise -	49
Child v. Lord Abingdon, 508.	516	— <i>and</i> Smith -	23, 24
— <i>and</i> Baker -	186. 188	— v. Terrel -	81
— v. Godolphin -	103	— v. Wilson -	213
— <i>and</i> Lord Irnham, 151. 156.	200	Clarkson <i>and</i> Morris -	322
Chillingworth v. Chilling-		Clavell <i>and</i> East India Comp. 659	
worth -	52	Clay v. Clay -	354. 356
Chirton's (Walter de) case -	626	Clay v. Sharpe -	331
Chitty <i>and</i> Williams -	338	Clayton <i>and</i> Fife -	29. 126. 217
Chivall v. Nicholls -	706	Clayton v. Lord Wilton -	654
Cholmondley (Marquis) v.		Clayworth <i>and</i> Cooke -	763
Lord Clinton -	357. 444	Clements <i>and</i> Hamilton -	245
Cholmondley v. Orford -	730	Clerk v. Clerk -	598
— <i>and</i> Pitt -	459	— v. Nettleship -	657
Cholmondeley (Earl of) <i>and</i>		— v. Wright -	84. 108
Lord Walpole -	144	— <i>and</i> Young, 6. 195. 242, 243	
Chomley's case -	648	Clermont (Lord) v. Tasburgh, 195	
Christian <i>and</i> Senhouse -	619	Clifford v. Laughton -	299
Christie <i>and</i> — -	285	Clifton v. Walmsley -	148

INDEX TO CASES.

xxvii

	Page
Clinan v. Cooke, 84. 86. 97. 117.	
	120. 299
Clinton and Trefusis - - -	64
— (Lord) and Marquis	
Cholmondley - - -	357. 444
Clissel and Leakins - - -	3
Clobery and Ker - - -	235. 272. 274
Clowes and Higginson, 29. 33. 84.	
	101. 126. 128. 131. 195.
	217. 294.
Clynn v. Littler - - -	175
Coare v. Creed - - -	14, 15
Cock v. Richard - - -	150
Cocker and Fludyer - - -	504. 521
Cockes v. Sherman - - -	738
Codd and Verlander - - -	86
Coffin v. Cooper - - -	373
Coghill v. Holmes - - -	831
Coke v. Wilcocks - - -	770
Colclough v. Sterum - - -	52
Coldcot (Dr.) v. Serjt. Hide,	
or Hill - - -	153. 592
Cole v. Gibbons - - -	247, 248
— and Pordage - - -	44
— v. White - - -	108, 109
Colegrave v. Dias Santos - - -	34
Coleman and Binstead, 108. 125	
— v. Upcot - - -	78. 80, 81
Coles and Forshall - - -	486. 685.
	App. No. 19.
Coles and Hunt - - -	479
— v. Trecothick, 80, 81. 94. 97,	
	98, 99. 101. 115. 196. 242.
	246. 600. 607.
Collet v. De Gols, 449. 749. 750	
Collett and Lloyd, 364. 366. 381.	
	516
— v. Thomson - - -	225
— v. Wollaston - - -	242
— and Shore - - -	469
Collier and Vansittart - - -	52

	Page
Collier and Wheeler - - -	25
Collinge's case - - -	522
Collins and Benyon - - -	528
— and Bliss - - -	318
Collyer v. Willcock - - -	513
Colman v. Sarrell - - -	833
Coltman and Dolin - - -	657
Colton v. Wilson - - -	342
Colvile v. Parker - - -	651. 656
Comer v. Walkley, 177, n. 502.	
	504. 511. 516. 538. 540. 557
Commissioners of Appeals in	
Prize Causes and Willis	512
Compton and Lady Bellasis, 628	
— and Ford - - -	81
— v. Richards - - -	33
Comyn and O'Gorman - - -	659
Conch v. Statton - - -	339
Conolly and Baxter - - -	341
— v. Parsons - - -	21, 22. 24
Conran v. Barry - - -	61, n.
Constable and Walker, 99. 101.	
	142. 244
Conway and Broughton - - -	586
— v. Shrimpton - - -	241
Cook and Bracebridge - - -	400
— and Sir John Burlace - - -	724
— and Fountain - - -	402
— vid. Cooth v. Jackson.	
— and Wallace - - -	389
— v. Booth - - -	148
— and Thomas - - -	73
— v. Clayworth - - -	763
— v. Cooke - - -	166. 459
Cooke and Clinan, 84. 86. 97. 117.	
	120. 299
— v. Fowndes - - -	583
— and Hockin - - -	300
— and Milligan - - -	279
— and Mussell - - -	88
— v. Soltau - - -	324

	Page		Page
Cooke v. Tombs, 78. 86. 88. 90. 108		Costigan v. Hastler -	194. 200
Cookson and Whelpdale, 609. 614		Cotbatch and McCulloch -	63
Coombs and Rosser -	308	Cotter v. Laver -	173, 174
Cooper and Aldrich -	562	Cotterell v. Hampson -	527
Cooper and Buxton -	4. 195. 241	— v. Dutton -	349, 350. 352
Cooper and Coffin -	373	Cottingham v. Fletcher, 104. 625	
— v. Denne -	314	Cottle and Withy, 192. 205. 211	
— and Loveridge -	729	Cotton and Campion -	637
— and Martinez -	406	Cotton v. Everall -	527, n.
— v. Smith -	83. 87. 94	Cotton v. King -	651
— and Fynmore -	728	— v. Lee -	78
Coote v. Mammon -	743	Court and Oliver -	600
Cooth v. Jackson, 89. 105. 108.		Courtown (Lord) and Under-	
	253	wood -	706. 737
Cope and Dukin -	511	Cousmaker v. Sewell -	329
— and Glover -	574	Coutts and Wallwyn -	649
Copeland v. Stephens -	46	Coverley v. Burrell -	265
Copner and Price -	357	Coward v. Odingsale -	368
Coppard and Harrison -	342	Cowell v. Simpson -	553
Coppin v. Coppin, 170. 554, n.		Cowper and Stiles -	123
	560. 562	Cox v. Bateman -	638
— v. Fernyhough -	313. 756	— v. Chamberlain -	520
Corbet v. Corbet -	339	— v. Paxton -	639
— and Ewer, 475. 546. 548. 550		— and Sheldon -	707. 742
Corbett and Kenn -	328	— and Swan -	231
Cordage v. Cole -	116	Cracroft and Rex -	67
Corder v. Drakeford -	78	Craddock and Lake -	619
— and Mason 276. 281. 313		Cragg v. Holme -	193
— v. Morgan -	331	Craig v. Hopkins -	493
Cordley and Beckett -	759	Crane v. Drake -	548
Cordwell v. Mackrill -	760	Crawford and Gordon -	246
Cornick v. Trapeaud -	668	Crayford v. Crayford -	591
Cornelius and Simmons, 111. 123		Creasy and Haycraft -	5. 727, n.
Cornish v. Rowley -	362. 370	Creed and Coare -	14, 15
Cornwall v. Williams -	198	Crespigny v. Wittenoom -	785
Cornwallis's case -	740	Creswell v. Byron -	339
Corp and Drewe -	327	— and Watts -	726
Corpe and Lampon -	555, n.	Crethorn and Harding -	759
Coryton and Hellier -	149, n.	Crewe v. Dicken -	314. 544
Cory v. Gerteken -	727	Cripps v. Reade -	488, 489
Coalake v. Till -	368	Crisp and Cruso -	18

INDEX TO CASES.

xxix

	Page
Crisp v. Heath - - -	479
— v. Pratt - - -	636
Crispe and Lloyd - - -	313
Crockford v. Alexander, 164.	206
— and Knight - 82. 94.	233
— v. Winter - - -	513
Croft v. Slec - - -	830
Crofton v. Ormsby, 659. 733.	754
Crofts v. Tritton - - -	236
Croker and Legge - - -	283
Crompton and Sale - - -	684
Crop v. Norton, 198. 200.	623.
	626. 929
Crosbie and Burke - - -	51
Crosby v. Arkwright - - -	785
— v. Middleton - - -	160
— v. Percy - - -	227
— v. Wadsworth - - -	76
Cross v. Faustenditch - - -	669
Crossby and Buckhouse, 78.	80.
	139
Crosse v. Young - - -	575, 576
Croucher and Jones - - -	658
Crowe v. Ballard - - -	610
— and Barnes - - -	172
Crowder v. Austin - - -	24
Crowther and Tawney - - -	86
Croyston v. Banes - - -	102
Cruso v. Crisp - - -	18
Crutchley v. Jerningham - - -	214
Cubbage v. Boatwright - - -	548
Cuff v. Penn - - -	125
Culpepper v. Aston, 527.	542.
	745
Cundall and Bell - - -	724
Cunningham v. Williams - - -	54
Cunynghame and Rose, 83.	88.
	167. 170. 180.
Currer or Comer v. Walkley, 177, n.	
	502. 504. 511. 516. 538. 540.
	557.

	Page
Curteis and Pincke, 231. 272.	366.
	374
Curtis v. Price - - -	51
— and Williamson - - -	528
— v. Marquis of Bucking-	
ham - - -	206
Curwyn v. Milner - - -	247
Curzon and Aston - - -	770
Custance and Holmes, 727, n.	
	759
Cuthbert v. Baker - - -	267. 536
Cutler v. Simons - - -	215
	D.
Dakin v. Cope - - -	511
Dalby and Rex - - -	629
Dale, ex parte - - -	567
— v. Lister - - -	279
— v. Sollet - - -	221
Dalton v. Hammond - - -	388
Daly and Kennedy 51. 454, n.	
	476. 737
— v. Osborne - - -	212
Damon and White - - -	242
Dana and Matthews - - -	211
Dancer and Ebrand - - -	636
Dane and Emanuel - - -	161
Daniel v. Adams - 97. 188.	190.
	196
Daniels v. Davison, 164. 218.	275.
	754. 756
Dannah and Wright - - -	100
Danvers and Doe - - -	357
— and Hunt - - -	577
D'Arcy v. Blake - - -	455, n.
Dare v. Tucker - - -	34. 466
Darkin v. Marye - - -	55
Darley v. Singleton - - -	245
Darris's case - - -	164
Darwin v. Lincoln - - -	788

	Page		Page
<i>Dashwood and Musgrave</i>	- 187	<i>Dean (Lord) and Kinnaird</i>	3. 5, n.
<i>Daubuz and Pye</i>	- 593	<i>Dean and Leech</i>	- 651, 652
<i>Davenport and Vale</i>	- 51	<i>Dean and Hodgson</i>	- 749
<i>Davids v. Adams</i>	- 114, n.	<i>Deane v. Rastron</i>	- 243
<i>Davidson v. Gardner</i>	- 603	<i>Deardon v. Lord Byron</i>	- 444
<i>Davie v. Beardsham</i>	162. 165. 169	<i>Deardon and Keene</i>	324. 355. 425
— <i>v. Sacheverell</i>	- 576	<i>Dearle v. Hall</i>	- 729
<i>Davies v. Austen</i>	- 728, 729	<i>Debar and Taylor</i>	- 592
— <i>and Denton</i>	- 640	<i>De Bernales v. Fuller</i>	- 513
— <i>and Owen</i>	80. 191. 501. 509	— <i>v. Wood</i>	- 514
— <i>v. Penton</i>	- 203	<i>Deem or Powell v. Howorth</i>	756
<i>Davis and Shirley</i>	- 284	<i>De Faria and Gowland</i>	247, 248, 249
— <i>and Selkirk</i>	- 620, n.	<i>De Gols and Collett</i>	449. 749. 750
— <i>v. Earl of Strathmore</i>	- 685	<i>De Graves v. Smith</i>	- 5
— <i>v. Hone</i>	- 193, 194	<i>De Haviland v. Bowerbank</i>	513
— <i>v. Jones</i>	- 190	<i>Dehew and Saunders</i>	- 732
— <i>and Swift</i>	- 631, 632	<i>Delane v. Delane</i>	- 626
<i>Davis and Thomas</i>	146. 154. 161	<i>Deligne and Saunders</i>	- 724
<i>Davis and Whitworth</i>	- 162	<i>De la Cour and Haigh</i>	- 161
— <i>and Wilks</i>	- 253	<i>Denn v. Cartwright</i>	- 733
<i>Davison and Daniels</i>	164. 218. 275. 754. 756	— <i>v. Kemneys</i>	- 402
<i>Davis's case</i>	- 237	— <i>and Ireson</i>	- 705
<i>Davy v. Barber</i>	- 501. 508	<i>Denne and Cooper</i>	- 314
<i>Davys v. Howard</i>	- 642	<i>Denew v. Deverall</i>	- 43
<i>Dauh and Berkeley</i>	- 216	<i>Denison and King</i>	- 633
<i>Dawes v. King</i>	- 3	<i>Denny and Hamilton</i>	- 622
<i>Dawson and Addison</i>	- 598	<i>Denton v. Davies</i>	- 640
<i>Dawson and Burke</i>	- 664	<i>Denton v. Stewart or Seward</i>	108. 218
<i>Dawson v. Ellis</i>	- 93, n.	<i>Derby Canal Company v. Wil-</i>	
— <i>and Frame</i>	- 110	mot	- 687
— <i>v. Massey</i>	- 606. 763	<i>Derivall and Dowse</i>	- 459
<i>Day v. Arundel</i>	767, n. 769	<i>Derrison and Shippey</i>	- 86. 95
— <i>and Attorney-General</i>	58. 102. 180	<i>Deschamps and Alley</i>	364. 367
— <i>and Blennerhasset</i>	- 603	<i>D'Esterre and Wheeler</i>	- 108
— <i>and Brooks</i>	- 486	<i>Deverall and Denew</i>	- 43
— <i>v. Fynn</i>	- 298	— <i>and Remington</i>	- 235
— <i>v. Newman</i>	- 242	<i>Deverell v. Lord Bolton</i>	305. 310
<i>Deacon and Foster</i>	- 519	<i>Deverell and Lord Ossulston</i>	- 308
— <i>v. Smith</i>	640, 641, 642	<i>Devon (Duke of) and Barker</i>	528

INDEX TO CASES.

xxxi

	Page		Page
<i>the Duke of</i> and		Doe v. Benson - -	127
<i>Countess of Normanby</i> , 92. 123.		— v. Bland - -	145
	202	— v. Brightwen - -	324
and Winter - -	188	— v. Breach - -	234
<i>ex parte</i> - -	356	— v. Burt - -	143
Brandt - -	245. 248	— v. Calvert - -	324
os and Colegrave -	34	— v. Danvers - -	357
City of London -	27	— v. Greenhill - -	481
<i>Baker</i> - -	331	— v. Hilder - -	430. 446
onald - -	341	— v. Hogg - -	698
d Crewe -	314. 544	— v. Hopkins - -	650
Eyton - -	328	— v. Jackson - -	234
and Morecock -	706	— v. James - -	647
v. Adams - -	114	— v. Jesson - -	351, 352
v. Baskerville, 114, n.		— v. Jones - -	349
v. Dickenson, 320. 530		— v. Lawder - -	234
v. Heron, 377. 505. 516.		— v. Lea - -	127
	523	— v. Luffkin - -	734. 755
v. Lockyer - -	546	— v. Lynes - -	274, n.
law - -	631	— v. Manning - -	650
and Atchison -	256, n.	— v. Martin - -	8. 663
ays - -	745	— v. Martyr - -	650. 659
and Lane - -	639	— v. Micklem - -	149, n.
icks - -	542	— v. Morris - -	646
Byrn - -	693, n.	— v. Oxenden - -	143
eman - -	350	— v. Pegge - -	407. 421
O'Fallon - -	711	— v. Perkins - -	10
Powell -	86. 754	— v. Philips - -	785
and Ulrich - -	145	— v. Pott - -	168, n.
d Powell - -	128	— v. Putland - -	440
d Adderly - -	192	— v. Routledge - -	647. 659
stley - -	213, 214	— v. Sayer - -	234
Stammers - -	149	— v. Scott - -	408. 425
Stevens - -	4	— v. Smith - -	234
. Leadbeater -	768	— v. Staple, 407, 408. 421. 423	
Beable - -	831	— v. Stace - -	430
Hine - -	707. 744	— v. Sybourn - -	423
el - -	240	— v. Wroot - -	407
lsop - -	707	D'Oliff and S. S. Company -	151
ndrews - -	763	Dolin v. Coltman - -	657
her - -	736	Dolland and Lyster -	478. 619

	Page		Page
Dolman (Sir Thomas) <i>and</i>		Dukes <i>and</i> Beaumont -	31
Smith - - -	374	Dumbell, <i>ex parte</i> -	599, 600
Doloret v. Rothschild -	192. 368	Dunbar v. Tredennick, 616.	733
Dolphin <i>and</i> Eyre -	707. 771	Dunch v. Kent - - -	527
Dolton v. Hewen - -	534	Dunn <i>and</i> Maclean - -	100
Donald <i>and</i> East India Com-		Dunsany (Lord) <i>and</i> Latouche	
pany - - -	202. 763, 764		704, n. 706
Donald <i>and</i> Dick - -	341	Dunsford <i>and</i> Eyre - -	5
Donegal <i>and</i> Bernal - -	247	Durand <i>and</i> Hart - -	145
Donovan <i>and</i> Pitt - -	742	Durdin <i>and</i> Gaskell - -	746
— v. Fricker - - -	515	Durell <i>and</i> Noble - -	300
Doran v. Wiltshire - -	530	Durham (Bishop of) <i>and</i>	
Dormer v. Parkhurst - -	358	Morrice - - -	62
Douglas v. Ward - -	651. 661	Dursley (Lord) v. Fitzhard-	
— v. Whitrong - - -	177	inge - - -	732
— v. Yallop - - -	487	Dutch v. Warren - -	221
Downes <i>and</i> Bartlett - -	440	Dutton <i>and</i> Cotterell, 349, 350.	
— v. Glazebrook - -	602		352
— <i>and</i> Wood - - -	611. 616	Dyer v. Dyer, 625. 628. 631. 634	
Dowse v. Derivall - -	459	Dyer v. Hargrave, 267. 369. 509	
Dowson <i>and</i> Pickering - -	292	Dyer <i>and</i> Price, 130. 138. 141. 285	
Doyley v. Countess of Powis, 44		Dyer v. Pulteney - -	164
Drake <i>and</i> Crane - - -	548	Dyke <i>and</i> Jones - -	40. 222
Drakeford <i>and</i> Corder - -	78	Dyke v. Sylvester - -	325
Drapers Company v. Yardly, 756			
Drewe v. Corp - - -	327	E.	
Drewe v. Hanson - -	270, 271	Earl v. Baxter - - -	312
Drewe <i>and</i> Payne - - -	688	Earl v. Rogers - -	155. 156, n.
Drummond <i>and</i> Boydell - -	87	Earle <i>and</i> Hungerford -	669
— <i>and</i> M'Leod - - -	548	— <i>and</i> Senhouse - -	660. 760
Drury <i>and</i> Drury, or Earl of		— <i>and</i> Wing - - -	302
Bucks - - -	338, 339, 340	East India Company v. Clavell, 659	
— v. Man - - -	388	— v. Donald - -	202. 763, 764
Du Cane, <i>ex parte</i> - -	602	— v. Hensley - - -	41
— <i>and</i> Howard - - -	609	Eaton v. Lyon - - -	148
Duckenfield v. Whichcott -	3	— <i>and</i> York - - -	617
Dudley (Lord) <i>and</i> Attorney-		Ebrand v. Dancer - -	636
General - - -	605	Echcliff v. Baldwin - -	206
— v. Dudley - - -	455	Edden v. Read - - -	221
— v. Foliott - - -	575	Edelph <i>and</i> Pitts - -	738
Duffel v. Wilson - - -	264		

	Page
1 (Sir J.) v. the Earl of Bute - - -	148
Adlin v. Battaly - - -	730
Edmunds and Powell, 28, 29.	126
Edney and Jones - 31. 42.	126
Edwards, <i>ex parte</i> - - -	724
— and Elliot - 228. 556.	558
— and Fournier - - -	214
— and Garstone - - -	60
— v. Harvey - - -	520
— v. Heather - - -	242
— v. Hodding - - -	42
— and Hollis, 68, n. 71, n.	203
— or Whiteing and Hollis,	107
— v. M'Leay - - -	499
— and Moore - - -	105
— and Perry - - -	576
— and Williams - 278.	383
Effingham (Lord) and Lord Portsmouth - - -	354
Egerton and Head - - -	767
— v. Matthews - - -	78
Eggington v. Flavel - - -	53
Egremont (Lord) v. Hamilton,	355
Ekins and Bailey - - -	533
— and Pippin - - -	152
— v. Tresham - - -	3, 4
Elderton and Lansdown - -	54
— and Spurrier - 42.	512
Eldridge v. Porter - - -	211
Elever and Amcourt - - -	230
Eliason and Parr - - -	659
Ellard v. Lord Llandaff, 193,	194.
	199
Elliot v. Brown - - -	619
— v. Edwards, 228. 558.	566
— v. Elliot - 630, 631.	634
— v. Merryman, 527. 533,	534.
	546. 550
Elliott and Robinson - - -	304
— and Clarke - 213.	215

	Page
Ellis and Bratt - 40. 222.	224
Ellis and Dawson - - -	93, n.
— and Knight - - -	App. n.
Ellison v. Ellison - - -	833
Elmherst and Blyth - 211,	212
Elmore v. Kingscote - - -	84
Elton and Burroughs - - -	620
Emanuel v. Dane - - -	161
Emerson and Andrews - - -	60
— and Riddle - - -	622
Emery and Chapman - 651.	660
Emery v. Growcock, 324. 447.	522
Emery v. Wase - 187. 189,	190.
	244. 252
Emmerson v. Heelis 47. 77.	88.
	95, 96, 97. 99, 100. 270
Emmott and Andrews - - -	830
Erhart and Gunnis - 28, 29.	126
Errington v. Annesley - - -	192
— and Randall - 612.	614
Esdaile v. Stephenson - 208.	268.
	373. 510
Estcourt v. Estcourt - - -	339
Evans v. Bicknell, 406. 427.	457.
	726. 763
— v. Brown - - -	245
— v. Griffith - - -	248
— v. Luellyn - - -	246
— and Peacock - 248,	249
— v. Roberts - - -	77
— v. Vaughan - - -	579
Evelyn v. Evelyn - - -	179
— v. Templar - 649, 650,	651.
	657
Everall and Cotton - - -	527, n.
Everard and Rex - - -	300, n.
Everest and Wickham - - -	213
Ewer v. Corbett - 475. 546.	548.
	550
— and White - - -	355
Exeter (Bishop of) and Gully	658

			Page
Excter (Bishop of) <i>and</i> Hill,	647.		
	650.	658	
—— (Bishop of) <i>and</i> Wyvill,	258		
Eyles <i>and</i> Hooper	-	-	626
Eylis <i>and</i> Hanger	-	241,	266
Eyre <i>and</i> Boone	-	-	362
—— v. Dolphin	-	707.	771
—— v. Dunsford	-	-	5
—— <i>and</i> Holland	-	-	82
—— v. Iveson	-	-	102
—— v. Lord Middleton	-	84,	n.
—— v. Popham,	84.	117.	200.
Eyton v. Dicken	-	-	328

F.

Fagg's case, or Fagg and		
Sherley	-	- 724
Fane v. Spencer	-	- 312
Fain v. Ayers	-	- 593
—— v. Brown	-	- 194
Fairbain and Adams	-	- 142
Fairchild v. Newland	-	- 710
Fairclaim v. Newland	-	- 709
Fairfax (Lord) and Bottomley,		456
Fairfield v. Birch,		655. App.
		No. 23.
Falkener and Morse	-	727, 728
Falkland (Lady) and Strode,		147
Fallon, <i>ex parte</i>	-	- 785
Farebrother v. Ansley	-	- 19
—— and Bethune	-	- 221
—— v. Prattent	-	- 42
—— v. Simmons	-	- 100
—— and Yates	-	- 43
Ferguson v. Maitland	-	- 246
Farley and Farquhar	-	512, 513,
		514
Farmer v. Rogers	-	156, n.
—— v. Robinson	-	- 98
—— and Shelling	-	- 147

			Page
Farmer v. Wardell	-	-	248
Farquhar v. Farley,	512, 513, 514		
— and M'Queen	-	271. 327.	
		516. 521. 758	
Farlow v. Weildon	-	-	60
Farr v. Newman	-	-	548
Farrell and Whitmell	-	-	204
Farrer v. Billing	-	-	316
— v. Farrer	-	-	153
— v. Nightingale	-	220. 264	
Farrington and Battersbee	-		656
Fauconberge and Fitzgerald			743
Fausset and Whitfield	-		729
Faustenditch and Cross	-		669
Fawcett and Longchamps	-		143
Fawell v. Heelis	-	554. 567	
Featherstonhaugh v. Fenwick,			
		200. 620.	
Fector v. Philpott	-	-	568
— <i>ex parte</i>	-	-	66
Fell v. Chamberlain	-	106. 127.	
		629	
Fenhoullet and Scott	-	-	460
Fenton and Browne	-	4, 38. 43	
		267. 285	
Fenwick and Featherstonhaugh,			
		200, 220	
Feoffees of Herriott's Hospital			
v. Gibson	-	33. 86	
Fergus v. Gore	-	-	62
Fermor's case	-	-	737
Fermor and Ferrers	-	-	402
Ferne v. Bullock	-	110. 123	
Fernyhough and Coppin,	313. 756		
Ferrars v. Cherry	-	660. 738. 756	
Ferrers v. Fermor	-	-	402
— and Hanning	-	-	726
— (Lord) and Upton	-	60. 63	
Field and Yea	-	-	468
Fielder v. Higginson	-	-	523
— v. Studley	-	153. 592	

INDEX TO CASES:

XXXV

	Page
<i>Fielding and Lewes</i> - -	771
— <i>and Philips</i> - -	226. 230
<i>Fife v. Clayton</i> - -	29. 126. 217
<i>Fifield and Twigg</i> - -	55. 508
<i>Fildes v. Hooker</i> , 208. 308. 319.	324
<i>Finch v. Finch</i> - -	631, 632
— <i>v. Newnham</i> - -	746
— <i>v. Earl of Winchelsea</i>	476
<i>Fingal (Lord) v. Ross</i> , 113.	115
<i>Fish and Sloper</i> - -	314. 686
<i>Finlay and Flood</i> - -	130
<i>Fishe v. Rogers</i> - -	388
<i>Fisher and Aubrey</i> - -	33
<i>Fitzgerald and Barton</i> -	584. 588
— <i>v. Fauconberge</i> - -	743
— <i>v. Foster</i> - -	24
— <i>and Spurrier</i> - -	106
<i>Fitzhardinge and Lord Dursley</i> ,	732
<i>Flavel and Eggington</i> - -	53
<i>Fleetwood v. Green</i> - -	213
<i>Fleetwood's (Sir Gerrard) case</i> ,	689
<i>Fletcher and Cottington</i> , 104.	625
— <i>and Hurd</i> - -	574. 579
— <i>and Long</i> - -	266
— <i>and Orlebar</i> - -	162. 341
— <i>and Sibson</i> - -	725
— <i>v. Sidley</i> - -	637
— <i>v. Tollet</i> - -	186
<i>Fleureau v. Thornhill</i> , 198. 222.	223, 224. 513
<i>Flexny and Kellick</i> - -	599
<i>Flint v. Brandon</i> - -	192
<i>Flood and Fryer</i> - -	636
— <i>v. Finlay</i> - -	130
<i>Florence and Tanner</i> - -	756
<i>Floyd v. Aldridge</i> - -	166
— <i>v. Bethill</i> - -	301
— <i>v. Buckland</i> - -	108

	Page
<i>Floyer v. Sherard</i> - -	245
<i>Fludyer v. Cocker</i> - -	504. 521
<i>Fohaine's (Lady) case</i> - -	162
<i>Foley and Moore</i> - -	148
— <i>v. Percival</i> - -	163. 177, n.
— <i>and Whitcom</i> - -	213
<i>Foljambe and Ogilvie</i> , 29. 82, 83.	88. 96
— <i>and White</i> - -	310. 341. 520
<i>Foliott and Dudley</i> - -	575
<i>Foorde and Hayes</i> - -	831
— <i>v. Wilson</i> - -	587
<i>Foot v. Salway</i> - -	127
<i>Forbes (Lord) v. Nelson</i> -	706
<i>Ford v. Compton</i> - -	81
— <i>and Fordyce</i> - -	276. 367
<i>Fordyce v. Ford</i> - -	276. 367
<i>Foreman and Wilson</i> - -	639
<i>Forester and Waldron</i> -	508. 517
<i>Forrester v. Lord Leigh</i> -	621
<i>Forshall v. Coles</i> - -	486. 684, 685.
	App. No. 12.
<i>Forster and Attorney-General</i> , 149	
— <i>and Fitzgerald</i> - -	24
— <i>v. Forster</i> - -	644
— <i>v. Hale</i> - -	86. 120
<i>Fort and Wilde</i> - -	225. 315. 362.
	449, n. 510. 514
<i>Forth and Harrison</i> - -	738
— <i>v. Duke of Norfolk</i> , 477.	692
<i>Foster v. Mapes</i> - -	576
— <i>v. Deacon</i> - -	519
— <i>and Serdon</i> - -	182
— <i>and Norman</i> - -	589
<i>Foster and Savage</i> - -	726
<i>Fothergill v. Fothergill</i> -	832
<i>Foulkes and Owen (6 Ves. jun.)</i>	600
<i>Foulks v. Owen (9 Ves. jun.)</i>	64
<i>Fountain v. Cook</i> - -	402
— <i>v. Young</i> - -	763

	Page		Page
Fournier v. Edwards - -	214	Fuller and De Bernales -	513
— and Bishop of Winchester,		Furgason v. Maitland -	246
	761	Ferguson v. Tadman -	519
Fowle v. Freeman - 78.	81. 91	Furnell and Zagury -	256
Fowle v. Welsh - -	576	Fursman and Radcliffe	762, n.
Fowler and Pechell -	235	Fynn and Day - -	298
— v. Willoughby -	165		
Fowndes and Cook -	583	G.	
Fox v. Birch - -	215	Gainsford v. Griffith -	589
— v. Mackreth - 599.	614	Gaisford and Acland, 45.	510. 516
— v. Wright - -	251	Gaitskill and Parnter -	41
Foxcraft v. Lister -	108	Gale and Lang - -	359
Frame v. Dawson -	110	Gallimore and Moss -	237
Francis and Burgh -	417, 728	Galloway (Lord) and Steadman,	
Francis v. Wigzell -	597		378
Frank v. Marshall -	766	Galton v. Hancock -	167
Franklin v. Lord Brownlow,	163.	Gamson and Barber -	789
	317	Gape v. Handley -	149
— and Murless -	632	Garbrand v. Allen -	597
Frederick and Morshend -	65	Gardiner and Goldson -	745
Freebody v. Perry -	215	Gardner and Davidson -	603
Freeland and Sayle -	185	Gardner v. Lord Townsend	641
Freeman v. Barnes -	391	Gardon, ex parte -	78
Freeman and Fowle - 78.	81. 91	Garland and Smith -	664
Freeman and Parsons (Revoca-		Garnons v. Swift -	227
tion) - -	167	Garnon and Ward -	149
— v. Taylor -	478, n.	Garrard v. Girling -	130
Freeman and Pasley -	5	Garraway and Meynell -	738
Freer and Thorp -	518. 521	Garrick v. Earl Camden -	55
Freme v. Wright -	341	Garstone v. Edwards -	60
Frere v. Moore -	568. 729	Garth and Hughes -	768
Frewen v. Relfe -	187	— v. Ward - -	745
Fricker v. Donovan -	515	Garthshore v. Chalie -	339. 640
Frith v. Parker -	368	Gartside v. Isherwood -	245
Frost and Brown -	206	— and Tipping -	57
Fry v. Porter -	741	Gascoign v. Stut -	693 n.
— and Wilkins -	35	— v. Thwing -	625, 626
Fryer v. Flood -	636	Gaskarth v. Lord Lowther -	81.
Fullagar v. Clark -	211		181. 517
Fullarton and Watts -	167	Gaskell v. Durdin -	746
Fuller v. Abrahams -	27		

	Page
<i>Geddes and Havelock</i> -	230. 360
<i>Gee and Todd</i> , 510; App. No. 20	
<i>Gee and Todd</i> -	218. 274
<i>Gell v. Vermedum</i> -	182
— <i>v. Watson</i> -	514
<i>Gennor v. Macmahon</i> -	159
<i>George and Abraham</i> -	678
— <i>and Howell</i> , 189. 194. 200	
— <i>v. Milbanke</i> -	659. 729
<i>Gerteken and Cory</i> -	727
<i>Gervoyes's case</i> -	334
<i>Gery and Milnes</i> -	253
<i>Gibbin and Prideux</i> -	167
<i>Gibbons v. Baddall</i> , 554, 555. 566	
— <i>and Cole</i> -	247. 248
<i>Gibbs and Abbot</i> -	527
— <i>and Brown</i> -	455
<i>Gibson and Chapman</i> -	725
— <i>v. Clarke</i> -	212. 214. 215
— <i>and Feoffees of Heriott's</i>	
<i>Hospital</i> -	33. 86
— <i>v. Jeyes</i> -	611
— <i>and Lake</i> -	618
— <i>v. Lord Montford</i> , 164, 165	
— <i>v. Paterson</i> -	363
— <i>v. Smith</i> -	299
<i>Giddings and Hitchcock</i> , 239. 494	
<i>Giffard v. Hort</i> -	51. 737
<i>Gifford v. Nugent</i> -	547, 548
<i>Gilbert and Camfield</i> -	221. 224, 225
<i>Gill v. Watson</i> -	215. 298
<i>Girdler and Capel</i> , 166, 167. 459, 460	
<i>Girling v. Garrard</i> -	130
<i>Glaister v. Hewer</i> -	636, 637
<i>Glazier and Goodright</i> -	176
<i>Glazebrook and Downes</i> -	602
— <i>v. Woodrow</i> -	230
<i>Glover v. Cope</i> -	574
<i>Godolphin and Child</i> -	103

	Page
<i>Godolphin (Lord) and Duke</i>	
<i>of Marlborough</i> -	574
<i>Goldson v. Gardiner</i> -	745
<i>Goman v. Salisbury</i> -	138, 139
<i>Gomeserra and Barrett</i> , 108. 242	
<i>Gompertz v. —</i> -	211
<i>Gooch and Owen</i> -	43
<i>Gooch's case</i> -	649
<i>Goodale and Middlemore</i> -	570
<i>Goodinge v. Goodinge</i> -	147
<i>Goodison v. Nunn</i> -	230
<i>Goodrick v. Brown</i> -	348
<i>Goodright v. Glazier</i> -	176
— <i>v. Hodges</i> -	628
— <i>v. Jones</i> -	357
— <i>v. Moses</i> -	651
— <i>v. Sales</i> -	459
— <i>v. Swymmer</i> -	324
<i>Goodtitle v. Meredith</i> -	172
— <i>v. Morgan</i> -	422. 494
— <i>v. Jones</i> -	355. 408. 423
— <i>v. Pope</i> -	237
— <i>v. Saville</i> -	178, n. 240
<i>Goodwin v. Clarke</i> -	234
— <i>and Hooper</i> -	63
— <i>v. Lightbody</i> -	162. 371
— <i>v. Lister</i> -	182. 184
— <i>and Pimm</i> -	357
<i>Goom v. Aflalo</i> -	95
<i>Gordon v. Ball</i> -	211
— <i>v. Crawford</i> -	246
— (Lord Wm.) <i>v. Marquis</i>	
<i>of Hertford</i> -	130
— <i>v. Trevalyan</i> -	84
<i>Gore and Fergus</i> -	62
— <i>v. Stacpole</i> -	51
— <i>v. Wigglesworth</i> -	733
<i>Gorge's (Lady) case</i> -	630. 636. 638
<i>Goring v. Nash</i> -	654
<i>Goeden and Ramsbottom</i> -	130

	Page		Page
Gosnold <i>and</i> Sheppard	- 149	Gregory <i>v.</i> Gregory	- 616
Goudge <i>and</i> Lane	- 150, n.	— <i>v.</i> Mighell	- 108. 253
Gough <i>and</i> Shine	- 723. 731	— <i>and</i> Rex	- 57
— <i>v.</i> Stedman	- 766	Gregson <i>and</i> Blackburn	555. 559.
Gould <i>and</i> Nicols	- 248, 249		567
— <i>v.</i> Okenden	- 246	— <i>v.</i> Riddle	- 378
Gourlay <i>v.</i> Duke of Somerset,	253	Greswold <i>v.</i> Marsham	- 479. 748
Gower <i>and</i> Attorney-General,	278.	Grey (Ld.) <i>v.</i> Lady Grey	630. 633
	742. 769	Griffin <i>and</i> Burnaby	- 186. 521
— <i>and</i> Ryder	- 62	— <i>v.</i> Stanhope	- 656. 669
Gowland <i>v.</i> De Faria	- 247, 248.	— <i>v.</i> Taylor	- 188
	249	Griffith <i>and</i> Attorney-general,	
— <i>and</i> Mayor	- 175		715, n.
Graham <i>v.</i> Graham	- 724	— <i>and</i> Evans	- 248
— <i>v.</i> Sime	- 388	— <i>and</i> Gainsford	- 589
Granger <i>v.</i> Worms	- 31	— <i>v.</i> Heaton	- 509
Grant <i>and</i> Clarke	- 129	— <i>and</i> Lloyd	- 57. 473
— <i>and</i> Halsey	- 266. 320	— <i>and</i> Twisleton	- 247. 249
— <i>and</i> Hamilton	- 197	Griffith <i>and</i> Wood,	164. 236. 278.
— <i>v.</i> Munt	- 285		496
— <i>and</i> Pendleton	- 145	Griffith <i>and</i> Wynne	- 216
— <i>and</i> Routledge	- 82	Griffiths <i>and</i> Chambers,	269, 270
— <i>v.</i> Shills	- 556	— <i>and</i> Spratley	- 245
Gray <i>v.</i> Gutteridge	- 40	Groobham <i>and</i> Jones	- 648
— <i>and</i> Hatton	- 78	Grove <i>and</i> Churchill	- 478. 748
Grayme <i>v.</i> Grayme	- 186	— <i>and</i> Michaux	- 598
Graysbrook <i>and</i> Hopkins	- 222	— <i>and</i> Watt	- 599
Greaves <i>v.</i> Ashlin	- 36. 125	Growcock <i>and</i> Emery,	324. 447.
Green <i>and</i> Fleetwood	- 213		522
— <i>v.</i> Jackson	- 486	Growsock <i>v.</i> Smith	- 231. 508
— <i>v.</i> Lowes	- 526, n.	Grueber <i>and</i> Knatchbull,	193. 271
— <i>v.</i> Smith	- 162. 180	Grugeon <i>and</i> Chetham	- 61
— <i>v.</i> Wood	- 368	Guest <i>v.</i> Homfrey,	266. 365. 376
Greene <i>v.</i> Lambert	- 459	— <i>and</i> Lewin,	270. 386. 522
Greenhill <i>v.</i> Doe	- 481	Gully <i>v.</i> Exeter (Bishop of)	- 658
— <i>v.</i> Greenhill	- 165	Gunnis <i>v.</i> Erhart	- 28, 29. 126
Greenstead's (East) case	672, 673.	Gunter <i>v.</i> Halsey	- 91. 107
	741	Guppy <i>and</i> Stevens,	218. 343. 346
Greenway <i>and</i> Sevier	- 240	Gutteridge <i>and</i> Gray	- 40
— <i>v.</i> Adams	- 218	— <i>and</i> Simpson	- 335
Greenwood <i>and</i> Noualle	- 329	Guyon <i>and</i> Smith	- 527. 538

	Page
Guy's Hospital and Baynham,	148
Gwillim v. Stone -	218. 307
Gwynne, <i>ex parte</i> -	45, 551, n.
Gwynne v. Heaton,	245. 248, 249
Gyde, <i>ex parte</i> -	- 36
Gyles and Moyse	- 617

H.

Hackwell and Clark -	110. 123
Haddenham (Inhabitants of)	
r. Rex -	- 596
Haddon's case -	- 188
Hagedon v. Laing -	- 362
Haigh v. De la Cour -	- 161
Halcot r. Markant -	- 638
Hale and Forster -	86. 120
Hale's case -	- 186
Hall, <i>ex parte</i> -	- 651
— v. Adkinson -	- 724
— v. Cazenove -	- 360
— and Dearle -	- 729
— v. Hardy -	188, 189. 202
— v. Jenkinson -	213, 214
— and Keech -	306, 307. 645
— v. Noyes -	- 599. 616
Hall v. Smith -	9. 369. 756
Hall r. Warren -	191. 200. 252
— and Wheate -	- 314
Hallett and Pennill -	642, 643
— r. Middleton -	- 593
Halsey and Austen -	- 563
— v. Grant -	- 266. 320
— and Gunter -	91. 107
Hamil v. Stokes -	- 729
Hamilton and Balgney -	639
— v. Clements -	- 245
— r. Denny -	- 622
Hamilton and Lord Egremont,	355
— r. Grant -	- 197
— and Hobhouse -	- 697

	Page
Hamilton v. Royse -	744. 757
— v. Worley -	- 179
Hammond and Dalton -	388
— v. Hill -	- 589
— v. Toulmin -	- 593
Hampson and Cotterell -	527
Hancock and Galton -	- 167
— and Spurrier,	257. 341. 368
Handley and Gape -	- 149
Hanger v. Eyles -	241. 266
Hankin and Hicks -	- 41
Hanning v. Ferrers -	- 726
— and Trent -	- 314
Hanson, <i>ex parte</i> -	- 567
— and Drewe -	270, 271
— and Macdonald -	- 341
— v. Roberdeau -	43. 45
— and Scott -	- 284
Hapell and Belworth -	- 264
Harcourt v. Knowel -	- 724
Hardcastle and Sparrow,	169, n.
Harding v. Crethorn -	- 759
— r. Nelthorpe -	- 498
— v. Suffolk -	- 143
Hardingham v. Nicholls -	768
Hardman and Omerod,	133. 372.
	528, n. 536
Hardwicke v. Mynd -	528. 545
— (Lord) v. Vernon,	610. 612
Hardy and Hall -	188, 189. 202
— v. Reeves -	- 760. 771
Hare and Haynes -	- 151
— v. Shearwood -	151. 158
Harford v. Purrier -	- 255
Hargrave v. Le Breton -	742
— and Dyer -	267. 369. 509
— and Sedgwick -	- 189
Harmood v. Oglander -	354, 355
Harnell and Bennett -	- 51
Harnett v. Yielding,	192. 194, 195.
	198. 282

	Page		Page
Harper and Barker - -	56	Haw and Levy - -	220
Harrington and Robinson -	682	Hawkins v. Holmes -	95. 117
— v. Secretan - -	212	— v. Kemp - -	232. 545
Harrington v. Wheeler -	367	— v. Obeen - -	182. 184
Harris and Barnwell, 265. 266.		— and Polyblank -	398
304. 318. 324. 327		— and Taylor - -	550
— v. Ingledew - -	770, 771	Hawley and Staughton -	189, n.
— and Pope - -	194	Haycraft v. Creasy -	5. 727, n.
— v. Pugh - -	479	Hayes v. Bickerstaff -	576
Harrison, ex parte - -	599	— v. Caryll - -	368
— v. Coppard - -	342	— v. Foorde - -	831
— v. Forth - -	738	— v. Kingdome - -	618
— v. Hollins - -	357	Haynes and Birch - -	212
— v. Southcote -	552. 711	— v. Hare - -	151
— v. Wright - -	205	Hays v. Bailey -	266. 319. 393.
Harrup and Buckmaster, 99. 101.		444. 520	
117. 180		Hayton and Calthorp -	577
Hart v. Durand - -	145	Hayward v. Lomax -	500
— and Wilson - -	97	— and Stevenson -	649
Hartley v. Peahall - -	315	Head v. Egerton - -	767
— v. Smith - -	ib.	— and Lady Teynham, 184, n.	
— v. Wilkinson - -	103	Headen v. Rosher - -	250
Harvey v. Ashley - -	758	Headley v. Roadhead -	563
— and Churchman - -	832	Heald and Bracebridge -	68, n.
Harvey and Belch - -	355	Heaps and Bowes - -	249
Harvey and Edwards - -	520	Heard v. Wadham -	230, 231
— v. Harvey - -	156	Hearn v. Botelers - -	554
— (Sir Thos.) v. Montague, 747		— v. Tomlin -	11. 233. 264
— v. Parker - -	185	— and Woollam -	128, 129
— v. Phillips - -	469	— v. James - -	81
— and Turner - -	6	Hearne and Sloman -	762
— v. Young - -	3	— v. Tenant - -	363
Harvy v. Woodhouse - -	724	Heath and Crisp - -	479
Hastler and Costigan -	194. 200	— v. Heath - -	314
Harwood v. Wallis - -	152	— and Schneider -	30. 291
Hasker v. Sutton - -	329	Heather and Edwards -	242
Hatchet and Watkins - -	767	Heathcote v. Paignon -	245
Hatt and Brotherton - -	742	Heaton and Griffith -	509
Hatton v. Gray - -	78	— and Gwynne, 245. 248, 249	
— v. Jones - -	647	Hedges and O'Herlihy, 84. 117.	
Havelock v. Geddes -	230. 360	200	

INDEX TO CASES.

xli

	Page
<i>Heelis and Emerson</i> , 47. 77. 88.	
95. 96. 97. 99. 100. 270	
<i>Heelis and Fawell</i> - 554. 556	
<i>Hegan v. Johnson</i> - - 234	
<i>Heisler and Clark</i> - - 659	
<i>Hellier and Coryton</i> - 149 n.	
<i>Henderson v. Wild</i> - 555, n.	
<i>Hendon</i> (Lord of the manor of)	
<i>and Rex</i> - - - 388	
<i>and Waller</i> - - 97	
<i>Henkle v. the R. E. A. Office</i>	
149. 159	
<i>Hennington v. Standley</i> - 231	
<i>Hensley and East India Com-</i>	
<i>pany</i> - - - 41	
<i>Herbert, ex parte</i> - - 751	
<i>Herbert's</i> (Sir Wm.) <i>case</i> - 483	
<i>Hercy v. Ballard</i> - - 354	
<i>Herritt's Hospital</i> (Feoffees of)	
<i>v. Gibson</i> - - 33. 86	
<i>Herne v. Meers</i> - - - 246	
<i>and Sloman</i> - - - 762	
<i>Heron and Dickenson</i> , 377. 505.	
516. 523	
<i>Heron v. Heron</i> - - - 638	
<i>and Norton</i> - - - 45	
<i>Hertford</i> (Marquis of) <i>v.</i>	
<i>Boore</i> - - - 376	
<i>(Marquis of) and Lord</i>	
<i>William Gordon</i> - - 130	
<i>Hervey v. Hervey</i> - - 832	
<i>Hesse v. Stevenson</i> - 153. 581.	
589	
<i>Hewen and Dolton</i> - - 534	
<i>Hewer and Glaister</i> - 636, 637	
<i>Heygate and Hulme</i> - - 172	
<i>Heylyn v. Heylyn</i> - - 173	
<i>Hibbard and Smith</i> , 163. 183. 342.	
516. 551	
<i>Hibbert v. Shee</i> - - - 264	
<i>Hickford v. Machin</i> - - 482	

	Page
<i>Hickman and Hopcraft</i> - 251	
<i>and Peterson</i> - 730, 731	
<i>and Earl of Plymouth</i> , 639	
<i>Hicks v. Hankin</i> - - 41	
<i>Hick</i> (Sir Harry) <i>v. Phillips</i> 241.	
275	
<i>Hide</i> (Serj.) <i>and Dr. Coldcot</i> , 153.	
592	
<i>Hiern v. Mill</i> - - - 754	
<i>Higginson v. Clowes</i> , 29. 33. 84.	
101. 126. 128. 131. 195. 217.	
294	
<i>and Fielder</i> - - - 523	
<i>Higgins v. the York Buildings</i>	
<i>Company</i> - - - 479	
<i>Hilbert and Wallinger</i> , 212. 272	
<i>Hilder and Doe</i> - - - 430. 446	
<i>Hiles and Jenkins</i> - 207. 370	
<i>Hill v. Adams</i> - - - 455	
<i>and Barker</i> - - - 163	
<i>v. Buckley</i> , 195. 196. 295.	
298	
<i>v. Carr</i> - - - 185	
<i>and Coldcott</i> - 153. 592	
<i>v. Bishop of Exeter</i> , 647.	
650. 658	
<i>and Hammond</i> - - 580	
<i>Hill and Holland</i> - - 323	
<i>and Lewes</i> - - - 642	
<i>and Nott</i> - - - 247. 253	
<i>v. Simpson</i> - - - 547	
<i>v. Worseley</i> - - - 745	
<i>Hillary v. Waller</i> , 312. 324. 407	
<i>Hilton v. Barrow</i> - - 217	
<i>Hinde v. Whitehouse</i> , 83. 86. 88.	
98. 101	
<i>Hine v. Dodd</i> - - - 707. 744	
<i>Hinton v. Hinton</i> - - 187	
<i>Hitchins v. Lander</i> - - 495	
<i>Hithcox v. Sedgwick</i> , 449. 723.	
749. 753	

	Page		Page
Hitchcock v. Giddings,	239. 494	Holmes and Poultney	- 75
Hitchcox and Underwood	- 242	Holt v. Holt	- - - 459
Hoare v. Parker	- - 767	Homfrey and Guest	- 266. 365. 376
Hobbs and Walton	- - 764	Hone and Davis	- - 193, 194
Hobhouse v. Hamilton	- 697	Honeycomb v. Waldron	- 701
— and Spratt	- - 668	Hooker and Fildes,	208. 308. 319. 321
Hobs v. Norton	- - 726	Hooper, <i>ex parte</i>	- - 115
Hobson and Rist	- - 80	— v. Eyles	- - 626
Hoby v. Roebuck	- - 74	— v. Goodwin	- - 63
Hockin v. Cooke	- - 300	— v. Ramsbottom	- - 569
Hodder v. Ruffin	- - 62	Hopcraft v. Hickman	- - 251
Hodding and Edwards	- 42	Hope v. Atkins	- - 125
Hodges and Goodright, or		Hopkins and Bond	- - 358
Langfielde	- - 628	— and Craig	- - 493, n.
— v. Jones	- - 60	— and Doe	- - 650
— v. Templar	- - 684	— v. Graysbrook	- - 222
Hodgson v. Dean	- - 749	Hopkyns and Howard,	6. 195. 204
Hodgson v. Le Bret	- - 95	Hopson v. Trevor	- - 204
— and Kendray	- - 47	Hopton and Jennings	- - 212
Hogg and Doe	- - 698	Horde and Taylor	- - 353
— v. Snaith	- - 125	Horford v. Wilson	- - 48
Hoggart and Waring	- 31, 32	Horne and Barrington	- 188
Holbech and Bree	- 489. 498	— and Moyl	- - 111
Holdsworth v. Holdsworth	- 562	Horn and Carter	- - 620
Holford and Barker	- - 53	— v. Horn	- - 528
— v. Lade	- - 407	— and Jelliff	- - 675
Holland v. Eyre	- - 82	Horndon (Inhabitants of) and	
— v. Hill	- - 323	Rex	- - - 73
— and Rex	- - 596	Horner and Cadman	- 192. 244
Hollier and Rex	- - 453	— and Mayor of Hull	- 828
Hollings and Matthews	- 488	Horniblow v. Shirley	- 266. 320
Hollins and Harrison	- - 357	Horsfall and Waller	- - 227
Hollis v. Edwards	- 68, n. 71, n.	Hort and Giffard	- 51. 737
— v. Whiteing or Edwards,	107	Horton and Nannock	- - 829
Holman, <i>ex parte</i>	- 324. 447	Horwood and Underhill	- 245
Holme and Cragg	- - 193	Hosier v. Read	- - 132
Holmes v. Ailsbie	- - 469	Hoskins and Trenchard	- 590
— v. Blogg	- - 597	Hovenden v. Lord Annesley,	
— v. Coghill	- - 831		354, 355. 357. 358
— v. Custance	- 727, n. 759		
— and Hawkins	- 95. 117		

INDEX TO CASES.

xliii

	Page
Houghton, <i>ex parte</i>	625. 631
— v. Rushley	- 688
How and Nicholls	- 452
— r. Stiles	- 402
— r. Weldon	- 724
Howard and Bell	140. 368
— r. Braithwaite	- 97
Howard v. Castle	21. 23
— and Davys	- 642
— v. Ducane	- 609
— r. Hopkyns	6. 195. 204
— and Wright	- 368
Howe v. Howe	- 625
Howell v. George, 189.	194. 200
— r. Richards	- 586
Howes v. Brushfield	- 581
Howland v. Norris, 266.	272, n. 502
<i>Heworth v. Powell or Deem</i> ,	756
Hoy and Noel	- 198. 209
Huddleson v. Briscoe	- 81, 82
Hudson v. Bartram	- 382
— and Wrightson	- 704
Hughes, <i>ex parte</i>	58. 600. 613,
	614. 730
— v. Bennett	- 591
— r. Garth	- 768
— v. Kearney	511. 556, 557
— and Rann	- 93. 133
— r. Robotham	- 401
Hulme v. Heygate	- 172
Hull (Mayor of) v. Horner	- 828
Humble v. Bill	528. 546. 549
— and Savage	- 546
Hungate v. Hungate	- 625
Hungerford (Sir Edward) and	
Blake	- 723
— v. Earle	- 669
— and Mildmay	- 285
Hunt v. Bourne	- 349
— v. Coles	- 479
— v. Danvers	- 577

	Page
Hunt and Mattock	- 264
Hunt and Mackpell	- 508
— and Simmons	- 488
— v. Silk	- 220
Hunter, <i>ex parte</i>	- 36
— v. Wilsons	256, n.
Huntingford and Woods	- 179
Huntley and Jaques	- 727
Hurd v. Fletcher	574. 579
Hussey v. Revel	- 255
Hutchinson v. Bell	- 5
— and Moulton	- 830
— v. Johnson	- 688
— and Rastel	106. 129
Hutton v. Lewis	- 785
Hyde v. Wroughton	- 212
Hylliard, <i>ex parte</i>	- 231
Hylton and Ramsden	- 656

I.

Ibbotson v. Rhodes	10. 764
Iggulden v. May	- 148
Inchiquin (Earl of) and Coun-	
tess of Shelburn	148. 150.
	159, 160
Inge v. Lippingwell	- 138
Ingledew and Harris	770, 771
Innes v. Breakspear	- 721
Inskip and Lord Braybroke,	325.
	545. 726
Ireson v. Denn	- 705
— r. Pearman	- 486
Irnham (Lord) v. Child,	151. 156.
	200
Irons v. Kidwell	- 708
Iseham v. Morrice	- 391
Isherwood and Gartside	- 245
Ithel v. Potter	- 95
— v. Beane	- 547
Iveson and Eyre	- 102

	Page		Page
J.			
Jackson's case - - -	733	Jenkins v. Hiles - -	207. 370
Jackson v. Cator - -	159	— v. Keymis, 185. 652, 653.	668
— and Cooth, 89, 105.	108.	— v. Reynolds - -	78
	253	Jenkinson and Hall -	213, 214
— and Doe - - -	234	— v. Pepys - -	29. 128
— v. Green - - -	486	— Watts - -	167, 168, n.
— v. Lever, 243. 258. 260.	262	Jenner v. Tracey - -	355
— v. Petrie - - -	234	Jennings v. Hopton -	212
— and Rich - 135, 136.	159	— v. Moore - - -	743
— and Rowe - - -	771	— v. Selleck - - -	724
— and Smith - - -	213	Jerdon v. Foster - -	182
— and Saunderson, 86.	93, 94	Jernegan and Willis -	245
Jackson and Tenant -	527, n.	Jerningham and Crutchley	214
Jacob and Rowntree -	555, n.	Jerrard v. Saunders, 723.	724. 770.
— and Worrall - - -	657		772
Jaffray and Card - -	83	Jerritt v. Weare - -	577
Jakeman and Shaw -	155. 228	Jervies and Peles - -	586
James, <i>ex parte</i> , 605. 609.	613,	Jervis and Jason - -	652
	614. 616. 733	Jervoise v. Clarke -	49
— and Doe - - -	647	— v. Duke of Northumber-	
— and Hearne - - -	81	land - - -	314
— v. James - - -	789	Jesson and Doe - -	351, 352
— v. Morgan - - -	241	Jeudwine v. Alcock -	207
— and Sir Samuel Romilly,	316	Jevon and Noel - -	334
— v. Shore - - -	270	Jewell and Boughton -	467
Janaway, <i>ex parte</i> - -	182	Jeyes and Gibson - -	611
Janssen and Chesterfield	248	Johnes and Lloyd - -	51
Jaques v. Huntley - -	727	Johnston and Bonner -	214, 215
Jason v. Jervis - - -	652	— and Hegan - - -	234
Jeanes v. Wilkins - -	692	— and Hutchinson - -	688
Jebb v. Abbot - - -	528	Johnson v. Johnson, 229.	271. 488,
Jeffries v. Small - -	618		489
Jeffery and Warde, 366.	374. 381	Johnson v. Legard -	656, 657
Jeffrey and Vawser - -	173	Johnson v. Mason - -	389
Jeffries and Cheek - -	788	— v. Nott - - -	593
— and Montague - - -	176	— and Proctor - - -	584
Jelliff v. Horn - - -	675	— and Sewell - - -	65
Jendwine v. Slade - -	220	— and Stansfield - -	99, 101
		Jolland v. Stainbridge, 485.	707.
			741. 764

INDEX TO CASES.

xlv

	Page
Jolliffe and Mertins, 738. 756. 765	
Jones v. Barkley - - - 230	
— <i>and</i> Brown - 651. 655	
— v. Bowden - - - 292	
— v. Croucher - - - 658	
— <i>and</i> Davis - - - 190	
— <i>and</i> Doe - - - 349	
Jones v. Dyke - - - 40. 222	
Jones v. Edney - 31. 42. 126	
— <i>and</i> Goodright - - - 357	
— <i>and</i> Goodtitle, 355. 408. 423	
— v. Groobham - - - 648	
— <i>and</i> Hatton - - - 647	
— <i>and</i> Hodges - - - 60	
— <i>and</i> King - - - 571	
Jones and Morphett - - - 108	
Jones v. Marsh - - - 656	
— <i>and</i> Matthews, 526, n. 760	
— <i>and</i> Moggridge - - - 231	
— v. Nanney - 19. 40	
— v. Newman - - - 143	
— v. Price - - - 365	
— v. Reilly - - - 205	
— v. Ryde - - - 488	
— v. Sheriffe - - - 160	
— v. Stanley - - - 738	
— v. Thomas - - - 769	
Jordan and Barnfather - 597	
— v. Savage - - - 338	
— v. Sawkins - - - 136	
— <i>and</i> Shenton - - - 205	
Jourdon and Alam - - - 763	
Joynes v. Statham - - - 129	
Jukes and Maidment - 304, n.	
Julian and Rayner - - - 216	

K.

Kain and Shepherd - - - 292	
Kancy and Watts, or Mutts 546	
Kaye and Tolson - - - 350	

	Page
Kaye v. Waghorn - - - 138	
Keane v. Roberts - - - 548	
Kearney and Hughes, 511. 556, 557	
Keeble and Wildigos - - - 710	
Keech v. Hall - 306, 307. 645	
— v. Sandford - - - 604	
Keen and Awbry - - - 488	
— v. Stukeley - - - 241	
Keene v. Deardon, 324. 355. 425	
Kellick v. Flexny - - - 599	
Kelly v. Powlet - - - 145	
Kelsall v. Bennett - - - 769	
Kelty and Brown - 214, 215	
Kemeys and Dean - - - 402	
Kemp and Hawkins - 232, 545	
— <i>and</i> Robson - 762, 763	
Kempson and Aspinall - 446	
Kemys v. Proctor - - - 100	
Kendar v. Milward - - - 638	
Kendray v. Hodgson - - - 47	
Kennedy and Burdon - - - 178	
— v. Daly, 51. 454, n. 476. 737	
— v. Lee - - - 88	
Kenney v. Wrenham - - - 509	
Kenn v. Corbett - - - 328	
Kenny v. Browne - 731. 758	
Kent and Bond - - - 553	
— <i>and</i> Dunch - - - 527	
— <i>and</i> Wirdman - - - 276	
Kenworthy v. Schofield, 86. 88. 100, 101	
Kenyon (Lord) and Myddleton 658	
— v. Sutton - - - 170	
Ker v. Clobery - 235. 272. 274	
Kett and Back - - - 172	
Ketsey's case - - - 597	
Keymis and Jenkins, 185. 652, 653. 668	
Keys and Vernon - - - 6	
Kidby and Luther - - - 170	

INDEX TO CASES.

xlvi

	Page
Langstaffe and Scott -	201
Langstroth v. Toulmin -	41
Langton and North -	459
— v. Tracey -	649
Lansdown v. Elderton -	54
— v. Lansdown -	238
Latham, <i>ex parte</i> -	243
Latouche v. Lord Dunsany, 704, n.	706
Laude and Lawson -	127
Laughton and Clifford -	299
Lavender v. Blackstone, 657. 669	
— and Spittle -	45
— v. Stanton -	529
Lawder and Doe -	234
Lawes v. Bennet -	177
Lawrence and Whichcote, 599.	605. 616
Lawrenson v. Butler, 197, n. 281	
Lawson v. Laude -	127
Layer and Cotter -	173. 174
Lea v. Barber -	78
— and Doe -	127
— and Osborn -	727
Leadbeater and Dobson -	768
Leake v. Morrice -	107. 112
Leakins v. Clissel -	3
Leatt and Stabback -	331
Le Bret and Hodgson -	95
Le Breton and Hargrave -	742
Lechmere v. Brazier -	57. 374
Lechmere v. Earl of Carlisle, 641,	642, 643
Lechmere (Lord) and Lewis, 205.	241. 368. 381
— Speldt -	728
Lee v. Arnold -	570, n.
— and Cotton -	78
— and Kennedy -	88
— v. Markham -	762
— v. Munn -	225. 512

	Page
Lee and Oxley -	662
Lee and Stanley -	814, n.
Lee and Tapp -	5. 727, n.
— and Walwyn, 724. 766, 767	
Leach v. Dean -	661
— v. Leech -	649
Lees v. Burrows -	48
Lefebury and Winged -	163. 202.
	733
Legal v. Miller -	140, 141
Legard v. Johnson -	656. 667
Legate v. Sewell -	185
Legeyt and Church -	220
Legge v. Croker -	283
Leicester's (Earl of) case -	831
Leigh (Lord) and Forrester, 621	
— and Lutkins -	562
— and Oswald -	828
— v. Winter -	669
Leigh and Smith -	522
Leighton and Ovey -	770
Leman and Dillon -	350
— <i>ex parte</i> -	724
Lench v. Lench, 625. 627, 628.	639
Lenham v. May -	499
Le Neve and Norris -	616. 742
— v. Le Neve -	707. 742
Lennon v. Napper -	193. 363
Leonard v. Leonard -	238
Lesley's case -	604
Lever (Sir Darcy) v. Andrews, 625	
— and Jackson, 243. 258. 260.	262
— and Page -	768
Levy v. Haw -	220
— v. Lindo -	381
Lewes v. Fielding -	771
— v. Hill -	642
Lewin v. Guest, 252. 270. 386.	
Lewis, <i>ex parte</i> -	600, n.

	Page		Page
<i>Lewis and Baxter</i>	- 231, 232	<i>Lloyd v. Spillet</i>	- 625, 626
— <i>v. Campbell</i>	- 570	— <i>v. Tomkies</i>	- 576
— <i>and Campbell</i>	- ib.	<i>Loaring, ex parte</i>	- 557
— <i>and Hutton</i>	- 785	<i>Lock and Burrowes</i> , 7. 11.	242.
— <i>v. Lord Lechmere</i> , 205.	241.		727
	368. 381	<i>Lockey v. Lockey</i>	- 108
— <i>v. Loxham</i>	- 520	<i>Lockyer and Dickenson</i>	- 546
— <i>v. Madocks</i>	- 640	<i>Lodge and Buck</i>	- 214
<i>Lichden v. Winsmore</i>	- 398	<i>Loggon and Pickett</i>	- 246
<i>Lifford and Swannock</i>	- 455, 456	<i>Lomax and Hayward</i>	- 500
<i>Lightbody and Goodwin</i> , 162,	371	<i>Londen and Vizod</i>	- 338
— <i>and Lubin</i>	- 212	<i>London (City of) and Dias</i>	- 27
<i>Lightburne v. Swift</i>	- 51	— <i>(City of) v. Richmond</i> ,	241
<i>Lill and Stadt</i>	- 78	<i>London (City of) v. Smith,</i>	
<i>Lilly v. Osborne</i>	- 636	<i>Treasurer of the W. I.</i>	
<i>Lincoln and Darwin</i>	- 788	<i>D. C.</i>	- 624
<i>Lindo and Levy</i>	- 381	<i>London and Tendring</i>	- 197
<i>Lindsay v. Lynch</i> , 84. 110.	118	<i>Long v. Fletcher</i>	- 266
— <i>v. Talbot</i>	- 762	<i>Longchamps v. Fawcett</i>	- 143
<i>Lingood and Sir J. Barnar-</i>		<i>Longdale and Vizard</i>	- 338
<i>diston</i>	- 247	<i>Lopus and Chandeler</i>	- 3
<i>Linwood, ex parte</i>	- 600	<i>Lord v. Lord</i>	- 67
<i>Lippingwell and Inge</i>	- 138	<i>Loveridge v. Cooper</i>	- 729
<i>Lister and Dale</i>	- 279	<i>Loveday and Abdy</i>	- 725
— <i>and Foxcraft</i>	- 108	<i>Low v. Barchard</i>	- 245
<i>Lister and Goodwin</i>	- 182. 184	— <i>and Charlton</i> , 455. 465.	723
<i>Lister v. Lister</i>	- 613	— <i>and Smith</i>	- 753
— <i>and Sikes</i>	- 163. 182	<i>Lowe v. Lush</i>	- 163. 317
<i>Little and Clynn</i>	- 175	— <i>v. Manners</i>	- 212
<i>Liversidge and Bellamy</i>	- 342	— <i>and Roe</i>	- 186
<i>Llewellyn v. Mackworth</i> , 354.	358	— <i>v. Swift</i>	- 122
— <i>and Williams</i>	- 602	<i>Lower and Weal</i>	- 185
<i>Lloyd, ex parte</i>	- 729	<i>Lowes and Green</i>	- 526, n.
— <i>v. Baldwin</i>	- 527. 529	<i>Lowndes v. Bray</i>	- 233. 316
— <i>v. Collett</i>	- 364, 366. 381.	— <i>v. Lane</i>	- 272. 283
	516	<i>Lowten and Parker</i>	- 762
— <i>v. Crispe</i>	- 313	<i>Lowther (Sir James) v. Lady</i>	
— <i>v. Griffith</i>	- 57. 473	<i>Andover</i>	- 377. 501
— <i>v. Johnes</i>	- 51	— <i>v. Carrill</i>	- 95
— <i>v. Read. See Loyd.</i>		<i>Lowther v. Carleton</i>	- 724. 738.
— <i>and Smith</i> , 43. 213, 214.	273		744

	Page
Lowther (Lord) <i>and</i> Gas-	
karth - 81. 181. 517	
— <i>v.</i> Lowther, 242. 547. 599	
Loyd <i>v.</i> Read - - 633. 636	
Loyes <i>v.</i> Rutherford - - 285	
Loxham <i>and</i> Lewis - - 520	
Lubin <i>v.</i> Lightbody - - 212	
Luellyn <i>and</i> Evans - - 246	
Luffkin <i>and</i> Doe - 734. 755	
<i>Luffkin v. Nunn</i> - - 735	
Lukey <i>v.</i> O'Donnell - - 243	
Lumley <i>and</i> Balmanno - 211	
— <i>v.</i> Reisbeck - - 237	
Lush <i>and</i> Lowe - - 163. 317	
— <i>v.</i> Wilkinson - - 637	
Luther <i>v.</i> Kidby - - 170	
Lutkins <i>v.</i> Leigh - - 562	
Lutwych <i>v.</i> Winford - - 51	
Luxton <i>v.</i> Robinson - - 226	
Lyddall <i>v.</i> Weston - 325. 328	
Lynch <i>and</i> Burnett - - 33	
— <i>and</i> Lindsay, 84. 110. 118	
Lynes <i>and</i> Doe - - 274, n.	
Lyon <i>and</i> Eaton - - 148	
Lysney <i>v.</i> Selby, 4, 5. 307. 494	
Lyster <i>v.</i> Dolland - 478. 619	
Lytton <i>v.</i> Lytton - - 357	

M.

Maberly <i>v.</i> Robins - 229. 514	
Macartney <i>v.</i> Blackwood - 515	
Macclesfield (Earl of) <i>v.</i> Blake, 64	
M'Culloch <i>v.</i> Cotbach - 63	
Macdonald <i>v.</i> Hanson - 341	
Macdowgall <i>and</i> Robertson, 742	
Macghee <i>v.</i> Morgan - - 245	
Machin <i>and</i> Hickford - - 482	
Macfarlan <i>and</i> Moses - - 221	
Mackenzie <i>and</i> York Build-	
ings Company, 599, 600. 605.	
612, 613. 616	

	Page
Mackintosh <i>v.</i> Townsend, 620, n.	
Mackpell <i>v.</i> Hunt - - 508	
Mackreth <i>and</i> Fox - 509. 614	
— <i>v.</i> Marlar - - 377	
— <i>v.</i> Symmons, 551. 554. 558.	
566. 568	
— <i>and</i> Waring - - 307	
Mackrill <i>and</i> Cordwell - 760	
Mackworth <i>and</i> Llewellyn - 354.	
358	
Maclachlan <i>and</i> Templer - 487	
Maclean <i>v.</i> Dunn - - 100	
<i>M'Leay and Edwards</i> - 499	
Macleod <i>and</i> Drummond - 548	
<i>Macklew and Agar</i> - - 254	
<i>Macmahon and Gennor</i> - 159	
Macnamara <i>v.</i> Arthur - 233	
— <i>and</i> Rigby (6 Ves. jun.	
117) - - - 63	
— <i>and</i> Rigby (6 Ves. jun.	
466) - - - 64	
— <i>and</i> Rigby (6 Ves. jun.	
515) - - - 51	
— <i>v.</i> Williams - - 217	
Mac Neil <i>and</i> Morris - - 235	
Mac Queen <i>v.</i> Farquhar, 271. 327.	
516. 521. 758	
Maddeford <i>v.</i> Austwick - 244	
Maddin <i>and</i> Pelly - - 625	
Maddison <i>v.</i> Andrews - 628	
Maddox <i>v.</i> Maddox - 742. 761	
— <i>and</i> Orrell - - 357	
Madocks <i>and</i> Lewis - - 640	
Magdalen College case - 648	
Magrane <i>v.</i> Archbold - 195. 203	
Maguire <i>v.</i> Armstrong - 736	
Maidment <i>v.</i> Jukes - 304, n.	
Main <i>v.</i> Melbourne, 44. 115. 368	
Maitland <i>and</i> Farguson - 246	
— <i>v.</i> Wilson - - 768	
Malden <i>and</i> Menell - - 726	

	Page		Page
<i>Mallom v. Bringlee</i>	- 598	<i>Martyr and Powell</i>	- 602. 521
<i>Maltby and Meux</i>	- 754	<i>Marwood v. Turner</i>	- 348
<i>Mammon and Coote</i>	- 743	<i>Marye and Darkin</i>	- 55
<i>Man and Drury</i>	- 388	<i>Mascall and Norton</i>	- 202
<i>Manners and Lowe</i>	- 212	<i>Mason v. Armitage</i>	98. 101. 195
<i>Manning, ex parte</i>	- 504. 508	— <i>v. Corder</i>	- 276. 281. 313
— <i>and Baylis</i>	- 304. n.	— <i>and Johnson</i>	- 389
— <i>and Doe</i>	- 650	<i>Massey and Dawson</i>	- 606. 763
<i>Mansell v. Mansell</i>	- 733	— <i>and Roberts</i>	- 44. 45. 502
<i>Mansell v. Price</i>	- 144	<i>Mathers and Pember</i>	29. 34. 35.
<i>Mapes and Foster</i>	- 576		151. 160. 236. 764
<i>Marbury and Tarback</i>	- 669	<i>Matthews v. Dana</i>	- 211
<i>Margravine of Anspach v.</i>		— <i>and Egerton</i>	- 78
<i>Noel</i>	- 213	— <i>v. Hollings</i>	- 488
<i>Markant and Halcot</i>	- 638	— <i>v. Jones</i>	- 526, n. 760
<i>Markham and Lee</i>	- 762	— <i>and Moss</i>	- 36. 45. 210
<i>Marlar and Mackreth</i>	- 377	— <i>and Stubbs</i>	- 51
<i>Marlborough (Duchess of)</i>		— <i>v. Wallwyn</i>	- 705
<i>and Brace</i>	- 417. 482. 770	<i>Mattock v. Hunt</i>	- 264
— <i>(Duke of) v. Lord</i>		<i>Mannd and Watkins</i>	- 679
<i>Godolphin</i>	- 574	<i>Maunde and Walter</i>	- 9. 318
<i>Marlow v. Smith</i>	- 314. 322	<i>Maundrell v. Maundrell</i>	- 333.
<i>Marriott and Spencer</i>	- 578		429. 455
<i>Marsh, ex parte</i>	- 601, 602	<i>Maunsfield's case</i>	- 335
— <i>and Brett</i>	- 500	<i>May and Iggulden</i>	- 148
— <i>and Jones</i>	- 656	— <i>and Lenham</i>	- 499
— <i>and Wade</i>	- 238, n.	— <i>and Newman</i>	- 219
<i>Marshall v. Frank</i>	- 766	<i>Mayfield v. Wadsley</i>	- 77, 78
— <i>and Nind</i>	- 587	<i>Mayor v. Gowland</i>	- 175
<i>Marsham and Greswold</i>	479. 748	— <i>and Wright</i>	- 762
<i>Martin and Botting</i>	- 73	<i>Mayhew and Bennet</i>	- 638
— <i>and Burrough</i>	- 10	<i>Mayhow and More</i>	738. 768, 769
— <i>and Doe</i>	- 8. 669	<i>Maynard's (Serj) case</i>	- 488, 489
— <i>v. Mitchell</i>	- 79. 188. 190.	<i>Mayoss and Spurrier</i>	- 515
	193	<i>Mead and O'Neal</i>	- 562
— <i>v. Smith</i>	- 226. 231	— <i>v. Lord Orrery</i>	- 547. 549
— <i>and Style, or Stiles</i>	- 746	<i>Meadows v. Duchess of King-</i>	
— <i>and Watts</i>	- 63	<i>ston</i>	- 770
<i>Martinez v. Cooper</i>	- 406	— <i>v. Tanner</i>	- 26
<i>Martyn and Blakeston</i>	- 483	<i>Meale and Seagood</i>	83. 88. 113.
<i>Martyr and Doe</i>	- 650. 659		116

INDEX TO CASES.

li

	Page		Page
Mease v. Mease	- 125	Middleton v. Hallett	- 593
Meder v. Birt	- 770	— v. Spicer	- 164
Medlicott v. O'Donel,	248. 356.	Middleton (Lord) v. Wilson	84
	616	Middleton v. Eyre	- 84, n.
— and Toole	- 108	— (Lord) and Pullen	- 186
Meers and Herne	- 246	Midgley and Bradshaw	- 516
Meers (Sir Thomas) and		Mighell and Gregory	- 108. 253
Lord Stourton	- 373, n.	Milbanke and George,	659. 729
— (Sir Thomas) v. Lord		Mildmay v. Hungerford	- 285
Stourton	- 373	— v. Mildmay	- 769
Melbour and Main,	44. 115. 368	Miles and Thompson,	226. 264.
Meller and Paine,	255, 256, 257.		370
	259. 304. 366. 374	Mill and Hiern	- 754
Mellish v. Mellish	- 150, n.	— and Portman	- 297
— v. Motteux	- 289	Millard's case	- 724. 768
Melsington (Lord) and Rosa-		Miller v. Blandist	- 110. 123
mond	- 158	— and Legal	- 140, 141
Mendham and Boswell	- 326	— and Rex	- 149
Menill and Malden	- 726	Milligan v. Cooke	- 279
Merceau and Preston	- 125	Millington and Williams	- 41
Meredith and Goodtitle	- 172	Mills v. Auriol	- 593
— and Woodhonse	- 599	— and Milner,	164, 165. 170
Meres v. Ansell	- 125	Milner and Curwyn	- 247
Merest and Morse	- 254	— v. Mills	- 164, 165. 170
Merry v. Abney	- 743	Milnes v. Gery	- 253
Merryman and Elliott,	527. 533.	Milward and Kendar	- 638
	534. 546. 550	— v. Earl Thanet	- 364. 376.
Mertens v. Adcock	- 36	Minchin and Whitcomb	- 599
Mertins v. Joliffe,	738. 756. 765	Minet, <i>ex parte</i>	- 78
— and Lacon,	107, 108. 114.	Minor, <i>ex parte</i>	- 53. 256.
	180. 510. 551	Mitchell and Buckle	- 663, 664
Mesnard v. Aldridge	- 29	— and Martin,	79. 188. 190. 193
Metcalfe v. Pulvertoft,	663. 747	— v. Neale	- 314. 388, 389
Metcalf v. Scholey	- 478	— and Richardson	- 766
Meux v. Maltby	- 754	Mitford v. Mitford	- 757
Meynell v. Garraway	- 738	Mitton and Roe	- 652, 653, 658
Michaux v. Grove	- 598	Moccatta v. Murgatroyd	- 759
Micklem and Doe	- 149, n.	Moggridge v. Jones	- 231
Middlemore v. Goodale	- 570	Mole v. Smith	- 333
Middleton and Crosby	- 160	Molesworth v. Opie	- 61

	Page		Page
<i>Moleyn's</i> (Sir John De) case	482	<i>Morphett v. Jones</i>	- - 108
<i>Mollett v. Brayne</i>	- - 73	<i>Morrel and Woodman</i>	- 632. 634
<i>Monck and Broome</i>	165. 170, 171. 180, 181	<i>Morrice v. Bishop of Durham</i>	62
<i>Monnoux and Appowel</i>	570, n.	— <i>and Iseham</i>	- - 391
<i>Montague and Sir Thomas</i>		— <i>and Leake</i>	- 107. 112
Harvey	- - - 747	<i>Morris and Bowen</i>	- 47. 79
— <i>v. Jeffries</i>	- - - 176	— <i>v. Clarkson</i>	- - 322
<i>Montesquieu v. Sandys</i>	- 611	— <i>and Doe</i>	- - 646
<i>Montfort (Lord) and Gibson</i>	164, 165	— (See <i>Norris</i>) <i>v. Howland</i> .	
<i>Montford (Lord) v. Lord Cadogan</i>	730	<i>Morris v. Knight</i>	- 229, n.
<i>Moore v. Bennett</i>	- - 756	<i>Morris and M'Niel</i>	- - 235
— <i>v. Edwards</i>	- - 105	— <i>and Lord Portmore</i>	- 158
— <i>v. Foley</i>	- - 148	— <i>v. Preston</i>	- - 283
— <i>and Frere</i>	- - 568. 729	— <i>v. Stephenson</i>	- - 188
— <i>and Jennings</i>	- - 743	— <i>and Staines</i>	- 34. 388. 520
<i>Moore and Pollexfen</i> , 162.	516. 551, n. 560. 565	<i>Morrice and Twining</i> , 21. 26.	195. 244. 275
<i>Moore and Stokes</i>	84. 93. 95	<i>Morrison v. Arnold</i>	- - 342
— <i>and Ward</i>	- - 170	<i>Morse v. Merest</i>	- - 254
— <i>and Wildgoose</i>	710, 711	— <i>v. Falkener</i>	- 727, 728
<i>More v. Mayhow</i>	- 738. 768, 769	— <i>v. Royal</i>	- - 248. 616
<i>Morecock v. Dickens</i>	- - 706	<i>Morshead v. Frederick</i>	- - 65
<i>Morgan, ex parte</i>	- 599, n. 612	<i>Mortimer v. Capper</i>	243. 258. 260. 262
— <i>and Baker</i>	- - 51	— <i>v. Orchard</i>	108. 118. 763
— <i>and Barksdale</i>	- - 301	<i>Mortley and Ramsbottom</i> , 88.	91
— <i>and Charlwood</i>	- 304, n.	<i>Mortlock v. Buller</i>	58. 97. 191. 196, 197. 242. 244. 281
— <i>and Corder</i>	- - 331	<i>Moses and Goodright</i>	- - 651
— <i>and Goodtitle</i>	- 422. 494	— <i>v. Macfarlan</i>	- - 221
— <i>and James</i>	- - 241	<i>Moss v. Gallimore</i>	- - 237
— <i>and M'Ghee</i>	- - 245	— <i>v. Matthews</i>	36. 45. 210
— <i>and Pearson</i>	- - 727	<i>Mosse and Trevannian</i>	- 768
— <i>and Randall</i>	- 622. 656	<i>Mostyn and Boardman</i>	- 120
— <i>v. Shaw</i>	- - 211. 213	<i>Moth v. Atwood</i>	- - 248
— <i>v. Tedcastle</i>	- 301, 302	<i>Motivos and Simon</i>	43. 98. 101
— <i>and Walters</i>	- - 105	<i>Motteux and Mellish</i>	- - 289
— <i>and Wynn</i>	- 370. 522	<i>Moulton v. Hutchinson</i>	- 830
<i>Morison v. Turnour</i>	- 94. 96	<i>Mountford v. Catesby</i>	- - 575
<i>Morony v. O'Dea</i>	- - 249	— <i>v. Scott</i>	- - 744
		<i>Moxon and Price</i>	- - 63

INDEX TO CASES.

liii

	Page
Moyle v. Horne - - -	111
Moyse v. Gyles - - -	617
Muggridge and Annesley 43.	523
Mulgrave (Lord) and Sheffield	
	314. 372
— (Lord) and Phipps	814, n.
Mumma v. Mumma 630.	633, 634
Munn and Lee - - -	225. 512
Munns and Nervin - - -	574. 585
Munt and Grant - - -	285
Murgatroyd and Mocatta -	759
Murless v. Franklin - - -	632
Murray and Ayliffe - - -	610
— v. Palmer - - -	246. 249. 616
Muschamp and Earl of Ardglass	
	247
Musgrave v. Dashwood - - -	187
— and Saunders - - -	28
Musgrove and Bennet - - -	662
Mussell v. Cooke - - -	88
Mutts v. Kancie - - -	546
Myddleton v. Lord Kenyon	658
Mynd and Hardwicke - - -	528. 545

N.

Nairn v. Prowse - - -	552, 553. 555.
	567. 651
Nanney and Jones - - -	19. 40
Nannock v. Horton - - -	829
Napper v. Lord Allington -	593
— and Lennon - - -	193. 363
Nash v. Ashton - - -	578
— and Goring - - -	654
— v. Palmer - - -	576
— and Shelly - - -	251
— v. Turner - - -	227
Naish and Tourville - - -	729. 738
Neal v. Viney - - -	78
Neale and Mitchel, 314.	388, 389
— v. Parkin - - -	295
Nedham v. Beaumont - - -	647

	Page
Needham and Norden - - -	678, n.
Needler v. Wright - - -	731
Nelson v. Aldridge - - -	40
— and Lord Forbes - - -	706
— v. Nelson - - -	155. 299
— and Reynolds - - -	205. 220
— and Smith - - -	57
Nelthorpe and Harding - - -	498
Nelthorpe v. Pennyman - - -	66
Nenny and Langham - - -	829
Nervin v. Munns - - -	574. 585
Nettleship and Clerk - - -	657
Neve (Le) and Norris - - -	616. 742
Nevill and William - - -	110. 123
Newall v. Smith - - -	522
Newcombe and Trower 4.	38. 285
Newell v. Ward - - -	532
Newham and May - - -	219
Newland v. — - -	686
— and Fairchild - - -	710
— and Fairclaim - - -	709
Newlyn and Pearce - - -	759
Newman and Day - - -	242
— and Farr - - -	548
— and Jones - - -	143
— v. Rodgers - - -	368
— and Thorn - - -	398
Newnham and Finch - - -	746
Newport's (Andrew) case - -	659
Newstead v. Searles - - -	651. 742
Newton and Baylis - - -	634
— v. Preston - - -	625, 626
— and Waddy - - -	301
— and Wheeler - - -	93. 188
Nicholls and Chivall - - -	706
— and Hardingham - - -	768
— v. How - - -	452
Nicloson v. Wordsworth, 207.	545
Nicols v. Gould - - -	248, 249
Nightingale and Farrer	220. 264
Nind v. Marshall - - -	587

Oakley and Burroughes	, 213,	214
Obeen and Hawkins	-	182. 184
O'Brien and Roche	-	248. 616
O'Connor v. Spaight	-	- 136
Odea and Browne	-	- 730
O'Dea and Morony	-	- 249
O'Dell v. Wake	-	- 687
Odingsale and Coward		- 368
O'Donel and Medlecott,	248.	356.
		616
O'Donnell and Lukey		- 243
O'Fallon v. Dillon	-	- 711
Ogbourne and Pitcairne,	140.	159
Ogilvie v. Foljambe	- 29.	82, 83.
		88. 96
Oglander and Harmood,	354,	355
O'Gorman v. Comyn	-	- 659
O'Hara v. O'Neal	-	- 625
O'Herlihy v. Hedges,	84.	117. 200
O'Kenden and Gould	-	- 246
Oldfield v. Round	24. 283.	289
Oldin v. Samborne	-	- 606
Olive and Stephens	-	- 657
Oliver v. Court	-	- 600
Omerod v. Hardman	- 133.	372.
		528, n.
O'Neal v. Mead	-	- 562
Oneby v. Price	-	- 184

INDEX TO CASES.

lv

	Page
O'Neil <i>and</i> O'Hara - -	625
Onions v. Tyrer - -	174
Only v. Walker - -	764, 765
Opie <i>and</i> Molesworth - -	64
Orchard <i>and</i> Mortimer, 108.	118.
	763
Ord <i>and</i> Brandling - -	738
Ord v. Noel - -	196
O'Reilly v. Thompson - -	110
Orey v. Leighton - -	770
Oxford <i>and</i> Cholmondley - -	730
Orlebar v. Fletcher - -	162. 341
Ormsby <i>and</i> Crofton, 659.	733. 754
Ormond (Lord) v. Anderson -	83
O'Rourke v. Percival - -	79. 199
Orrell v. Maddox - -	357
Orrery (Lord) <i>and</i> Mead, 547.	549
Ortread v. Round - -	189, 190
Osbaldeston v. Askew - -	327
Osborne <i>and</i> Daly - -	212
— <i>and</i> Roll - -	570, n.
Osborn v. Lea - -	727
— <i>and</i> Lilly - -	636
Osbourne <i>and</i> Rex - -	149
Osgood v. Strobe - -	653. 832
Ossulston (Lord Deverell) - -	308
Oswald v. Leigh - -	828
Ovey <i>and</i> Pritchard - -	202. 253
Owen v. Davies, 80. 191.	501. 509
— v. Foulks (6 Ves. jun,	
630, n. 6) - -	600
— v. Foulks (9 Ves. jun.) -	64
— v. Gooch - -	43
— v. Parry - -	20
Oxenden <i>and</i> Doe - -	143
Oxford (Lord) <i>and</i> Langley, 527, n.	
	550
Oxford (Lord) v. Lady Rodney, 179	
Oxley v. Lee - -	662
Oxwick v. Brockett - -	299
Oxwith v. Plummer - -	756

P

	Page
Page v. Lever - -	768
— <i>and</i> Robinson - -	130
Page <i>and</i> Sharp - -	387
Paignon <i>and</i> Heathcote - -	245
Paine <i>and</i> Baker - -	160
— v. Meller - -	255, 256, 257.
	259. 304. 366. 374
— <i>and</i> Bishop of Winchester,	
	521. 745
Palmer <i>and</i> Murray, 246.	249. 616
— <i>and</i> Nash - -	576
Palsey v. Freeman - -	5
Parker <i>and</i> Attorney-General, 149	
— <i>and</i> Baldey - -	270
— v. Blythmore - -	772
— v. Brooke - -	761
— <i>and</i> Colville - -	651. 656
— v. Frith - -	368
— <i>and</i> Harvey - -	185
— <i>and</i> Hoare - -	767
— v. Staniland - -	76
— v. Serjeant - -	651
— v. Whitby - -	249
— <i>and</i> Bishop of Worcester, 724	
Parkes v. White - -	599
— <i>ex parte</i> - -	552
Parkhurst <i>and</i> Dormer - -	358
— v. Lowten - -	762
Parker <i>and</i> Neale - -	295
Parkins v. Titus - -	388
Parks v. Wilson - -	204
Parnther v. Gaitskill - -	42
Parr v. Eliason - -	659
Parry v. Carwarden - -	662
— <i>and</i> Owen - -	20
— v. Wright - -	732
Parsons v. Freeman (Revoca-	
tion) - -	167
— <i>and</i> Conolly - -	21, 22. 24

	Page		Page
Parteriche v. Powlett -	125	Pennyman and Nelthorpe -	66
Partington, <i>ex parte</i> -	59, 61	Penpraze and Prior -	476
Pauley v. Freeman -	5	Pentland v. Stokes -	706
Pate and Urmston -	494	Penton and Davies -	203
Paternoster and Webb -	74	Pepys and Jenkinson -	29, 128
Paterson and Gibson -	363	Percival and Foley, 163. 177, n.	
Paton v. Brebner -	280	— and O'Rourke -	79, 199
— v. Rogers -	208, 211, 510	Percy and Crosby -	227
Patten and Alsop -	112	Perkins and Biscoe -	733
Patterson v. Slaughter -	771	— and Doe -	10
Paul v. Wilkins -	163	Perry v. Edwards -	576
Paxton and Cox -	639	— and Freebody -	215
Payne v. Cave -	38	— v. Phelps -	639
— v. Drewe -	688	Peters v. Anderson -	500
<i>Peachy's (Sir John) case</i> -	627	Peterson v. Hickman -	730,
Peacock v. Evans -	248, 249		731
— v. Thewer -	672	Petrie and Jackson -	234
Peake, <i>ex parte</i> -	554	Phelps and Perry -	639
Pearce v. Newlyn -	759	Philips and Bateman -	78, 227
Pearman and Ireland -	486	— v. Bridges -	347
Pearson v. Morgan -	727	— v. Duke of Buckingham	
— v. Pearson -	63		201
— v. Pulley -	355	— and Doe -	785
Pechell v. Fowler -	235	— v. Fielding -	226, 230
Pegge and Doe -	407, 421	— and Harvey -	469
Peahall and Hartley -	315	Philips and Sir Harry Hick, 241.	
Peles v. Jervis -	586		275
Pelley v. Maddin -	625	— v. Redhel -	756
Pember v. Mathers -	29, 34, 35,	Phillips v. Chamberlain -	150, n.
	151, 160, 236, 764	— and Lady Saltoun -	310
Pembroke (Earl of) and Baden		Phillimore v. Barry -	94, 95
	163, 464.	Philpott and Fector -	568
— (Earl of) and Cator -	499	Phipps v. Lord Mulgrave -	98
Pembroke's (Earl of) case -	465	— v. Sculthorpe -	73
Pendleton v. Grant -	145	Phyn and Bell -	620, n.
<i>Pengall (Lord) v. Ross</i> , 113. 115		Pickering v. Dowson -	292
Penballow and Smartle -	631	— v. Lord Stamford -	339
Penhules and Treswallen -	301	Pickersgill and Bartlett, 106. 625.	
Penn and Cuff -	125		629
Pennill v. Hallett -	642, 643	Pickett v. Loggon -	246
Pennington v. Boechey -	770	Pierce and Acton -	202

INDEX TO CASES.

lvi

	Page
<i>Pierce and Basket</i> - -	391
<i>— and Smith</i> - -	ib.
<i>Pierson and Blemerhasset</i> -	137
<i>Pigott v. Waller</i> 169. 172.	830
<i>Pilling v. Armitage</i> - -	764
<i>Pimm v. Goodwin</i> - -	357
<i>Pinchard and Wihers</i> - -	189
<i>Pincke v. Curteis</i> , 231. 272.	366.
	374
<i>Pindar v. Wadsworth</i> - -	326
<i>Pippin v. Ekins</i> - -	152
<i>Pitcairne v. Ogbourne</i> , 140.	159
<i>Pitt and Berney</i> - -	247
<i>Pitt v. Cholmondley</i> - -	459
<i>Pitt v. Donovan</i> - -	742
<i>— and Langford</i> , 170, 171.	370
<i>Pitts v. Edelph</i> - -	738
<i>Platt (Lady) v. Sleaf</i> - -	398
<i>Pledwell and Thomas</i> - -	685
<i>Plummer and Oxwith</i> - -	756
<i>— and Champion</i> - -	83
<i>Plymouth (Earl of) v. Hick-</i>	
<i>man</i> - - -	639
<i>Pole v. Pole</i> - -	635
<i>Pollard and Wood</i> - -	559
<i>Pollexfen v. Moore</i> - 162.	516.
	551, n. 560. 565
<i>Polyblank v. Hawkins</i> - -	398
<i>Pomeroy, ex parte</i> - -	46
<i>Pomfret (Earl of) v. Lord</i>	
<i>Windsor</i> - - -	355
<i>Poole v. Rudd</i> - -	44
<i>— v. Shergold</i> - 255. 268.	270
<i>Pope and Bevant</i> - -	334
<i>— and Goodtitle</i> - -	237
<i>— v. Harris</i> - -	194
<i>— v. Root</i> - -	243. 259
<i>— v. Simpson</i> - -	341. 368
<i>Popham v. Eyre</i> - 84. 117.	200.
	368
<i>— and Roe</i> - -	628

	Page
<i>Pordage v. Cole</i> - -	44
<i>Porter and Blakey</i> - -	227
<i>— and Fry</i> - -	741
<i>— and Eldridge</i> - -	311
<i>— and Richards</i> - -	83
<i>Portman v. Mill</i> - -	297
<i>— v. Willis</i> - -	691
<i>Portmore (Lord) v. Morris</i> -	158
<i>Portsmouth (Lord) v. Lord</i>	
<i>Effingham</i> - -	354
<i>Pott and Doe</i> - -	168, n.
<i>Potter and Ithel</i> - -	95
<i>— v. Potter</i> , 117. 170. 180, n.	
<i>Potts v. Webb</i> - -	366. 380
<i>Poultney v. Holmes</i> - -	75
<i>Pounsett and Kirkland</i> , 11.	224.
	234
<i>Powell v. Divett</i> - -	128
<i>— v. Dillon</i> - -	86. 754
<i>— v. Edmunds</i> - 28, 29.	126
<i>Powell or Deem and Howorth</i>	
	756
<i>Powell v. Martyr</i> - -	502. 521
<i>— v. Powell</i> - -	185. 323
<i>— v. Seabourne</i> - -	592
<i>— and Stratford</i> - -	157
<i>— and Thomas</i> - -	497
<i>Powis (Countess of) and Doy-</i>	
<i>ley</i> - - -	44
<i>Powlett and Kelly</i> - -	145
<i>— and Parteriche</i> - -	125
<i>Pranker v. Pranker</i> - -	632
<i>Pratt and Crisp</i> - -	636
<i>Prattent and Farebrother</i> -	42
<i>Prestage v. Langford</i> 603.	607.
<i>Preston v. Barker</i> - -	60
<i>— v. Merceau</i> - -	125
<i>— and Morris</i> - -	283
<i>— and Newton</i> - -	625, 626.
<i>— v. Tubbin</i> - -	743. 745.
<i>Preswick and Walker</i> - -	566

	Page		Page
Price <i>and</i> Baugh	248. 249- 730	Pyke <i>v.</i> Williams	- - 108
— <i>v.</i> Byrn	- - 605. 616	Pymar <i>and</i> Walters	- - 213
— <i>v.</i> Copner	- - 357		
— <i>and</i> Curtis	- - 51	Q.	
Price <i>v.</i> Dyer, 130. 138. 141. 285		Quaintrell <i>v.</i> Wright	- - 143
Price <i>v.</i> Jones	- - 365	Quincey <i>and</i> Scrafton	- - 701
— <i>and</i> Oneby	- - 184	— <i>ex parte</i>	- - 34
Price <i>and</i> Mansell	- - 144	Quinchant <i>and</i> Pritchard	- 155
Price <i>v.</i> Moxon	- - 63		
— <i>v.</i> Price	- - 64	R.	
— <i>v.</i> Strange	- - 314		
Priddy <i>v.</i> Rose	- - 729	Rabbett <i>v.</i> Raikes	- - 33
Prideaux <i>v.</i> Prideaux	- - 61	Radcliffe <i>v.</i> Fursman	- - 762
Prideux <i>v.</i> Gibbin	- - 167	— <i>v.</i> Warrington	- 310. 364
Prior <i>v.</i> Penpraze	- - 476		367. 372
Pritchard <i>and</i> Carter	- - 767	Radd <i>and</i> Taylor	- 150. 159
— <i>v.</i> Ovey	- - 202. 253	Radford <i>v.</i> Bloodworth	- 675
— Quinchant	- - 155	— <i>v.</i> Wilson	- 185, 186. 770
Proctor <i>v.</i> Johnson	- - 584	— <i>and</i> Young	- - 401
— <i>and</i> Kemys	- - 100	Radnor (Earl of) <i>v.</i> Shafto, 178, n.	181
— <i>and</i> White	- 99, 100	— <i>v.</i> Vendebendy, or Ro-	
— <i>v.</i> Warren	- - 637	theram	- 455, 456. 769.
Prodgers <i>v.</i> Langham	- - 659	Raikes <i>and</i> Rabbett	- - 33
Prosser <i>v.</i> Watts	- - 329	Raindle <i>and</i> Brown	- - 187
Prothers <i>and</i> Williams	- 496	Raine <i>and</i> Barclay	- - 469
Prowse <i>and</i> Nairn, 522. 553. 555.		Raleigh's (Sir Walter) case	- 634
	567. 651	Ramsbottom <i>v.</i> Gosden	- 130
Prujean <i>and</i> Smart	- - 173	— <i>and</i> Hooper	- - 569
Pugh <i>and</i> Harris	- - 479	— <i>v.</i> Mortley	- - 88. 91
Pullen <i>v.</i> Lord Middleton	- 186	— <i>v.</i> Tunbridge	- - 91
Pulley <i>and</i> Pearson	- - 355	Ramsdon <i>v.</i> Hylton	- - 656
Pulteney <i>and</i> Lady Cavan	- 581	Randall <i>and</i> Burkett	- - 123
— <i>and</i> Dyer	- - 164	— <i>v.</i> Errington	- 612. 614
Pulvertoft <i>and</i> Metcalfe, 663. 747		— <i>v.</i> Morgan	- 622. 656
— <i>v.</i> Pulvertoft	- 657. 668	— <i>and</i> Tappenden	- - 224
Purrier <i>and</i> Harford	- - 255	Rann <i>v.</i> Hughes	- - 93. 133
Purvis <i>v.</i> Rayer	- - 310	Rapier <i>and</i> Seymour	- - 145
Putbury <i>v.</i> Trevalion	- 169, n.	Rastall <i>and</i> Wilson	- - 762
Putland <i>and</i> Doe	- - 440	Rastel <i>v.</i> Hutchinson	- 106. 629
Pye, <i>ex parte</i>	- - 658		
— <i>v.</i> Daubuz	- - 593		

	Page		Page
ron <i>and</i> Deane -	243	Rex <i>v.</i> Inhabitants of Had-	
lins <i>v.</i> Burgis -	170	denham -	596
'son, <i>ex parte</i> -	724	— <i>v.</i> Inhabitants of Lain-	
er <i>and</i> Purvis -	310	don -	124
mond <i>v.</i> Webb -	58	— <i>v.</i> Lamb -	453
ner <i>v.</i> Julian -	216	— <i>v.</i> Miller -	149
<i>v.</i> Williams -	617	— <i>v.</i> Osbourne -	149
ead <i>and</i> Edden -	221	— <i>v.</i> Inhabitants of Scam-	
Read <i>and</i> Hosier -	132	monden -	124
Read <i>and</i> Loyd -	633. 636	<i>Rex v. Smith</i> -	449, n. 451
— <i>and</i> Smith -	711	Rex <i>v.</i> Inhabitants of Standon	73
— <i>and</i> Wagstaff -	768, 769	— <i>v.</i> Snow -	162, n.
— <i>v.</i> Ward -	674	— <i>v.</i> St. John -	453
Reade <i>and</i> Cripps -	448	— <i>v.</i> Varlo -	149
— <i>and</i> Roe -	408. 423	— <i>v.</i> Withers -	762
Redding <i>v.</i> Wilkes -	108	Reynolds <i>v.</i> Blake -	57
Redhel <i>and</i> Philips -	756	— <i>and</i> Jenkins -	78
Redington <i>v.</i> Redington, 625. 630,		— <i>v.</i> Nelson -	205. 220
631, 632, 633, 634		— <i>ex parte</i> -	529. 613, 614
Reed <i>v.</i> Williams -	760	Rhodes <i>and</i> Ibbetson -	9. 764
Reeves <i>and</i> Hardy -	760. 771	— <i>and</i> Selsey (Lord) -	602
Reid <i>v.</i> Shergold -	726	Rice <i>and</i> Bridger -	196
Reilly <i>v.</i> Jones -	205	Rich <i>v.</i> Jackson -	135, 136. 159
Reisbeck <i>and</i> Lumley -	237	— <i>v.</i> Rich (2 Ch. Ca.) -	459
Relfe <i>and</i> Frewen -	187	— <i>v.</i> Rich (Cro. Eliz.) -	591
Remington <i>v.</i> Deverall -	235	Richards <i>v.</i> Barton 224. 385. 388	
Revel <i>v.</i> Hussey -	255		477
<i>Rex v. Abbot</i> -	14	— <i>and</i> Cook -	150
Rex <i>v.</i> Bellringer -	149	— <i>and</i> Compton -	33
— <i>v.</i> Boston -	106. 629	— <i>and</i> Howell -	586
— <i>v.</i> Bullock -	678	— <i>v.</i> Porter -	83
— <i>v.</i> Cracroft -	67	Richardson <i>v.</i> Mitchell -	766
— <i>v.</i> Dalby -	629	— <i>and</i> Turner -	46
— <i>v.</i> Everard -	300, n.	Richmond <i>and</i> City of London	241
— <i>v.</i> Gregory -	57	Ricks <i>and</i> Dyke -	542
— <i>v.</i> Lord of the Manor of		Riddle <i>v.</i> Emerson -	622
Hendon -	388	— <i>and</i> Gregson -	378
— <i>v.</i> Holland -	596	Rider <i>v.</i> Kidder -	625. 628
— <i>v.</i> Hollier -	453	Ridgard <i>and</i> Bonney, 547, 548,	
— <i>v.</i> Inhabitants of Horn-			549
don -	73	Ridler <i>v.</i> Ridler -	598

	Page		Page
Rigby v. Macnamara (6 Ves.		Roe v. Mitton -	652, 653. 658
jun. 117) - - -	63	— v. Popham -	- 628
— v. Macnamara (6 Ves.		— v. Reade -	- 408. 423
jun. 466) - - -	64	— v. Rowleston -	- 352
— v. Macnamara (6 Ves.		Roebuck and Calcraft -	10. 274.
jun. 515) - - -	51		276. 502. 516. 524
Right v. Bawden -	- 631	— and Hoby -	- 74
— v. Beard -	- 234	Roffey v. Shallcross -	- 274
Ripley v. Waterworth -	- 177	Rogers and Bowles, 36. 162. 377.	
Risney v. Selby 4, 5. 307. 494			567
Rist v. Hobson -	- 80	— and Bruce -	- 245
Rivers v. Steele -	- 747	Rogers v. Earl -	155, 156, n.
Roach and Rowe -	- 742	Rogers and Farmer -	156, n.
— v. Wadham -	572, 573	— and Fishe -	- 388
Roadhead and Headley -	563	— and Newman -	- 368
Rhoades and Sharpe -	520. 687	— and Paton -	207, 208. 211.
Roake v. Kidd -	314. 328		510
Rob v. Butterwick -	- 156	— v. Seale -	- 772
Roberdeau and Hanson 43. 45		— v. Skillicorne -	- 528
Roberts and Evans -	- 77	Rokeby (Lord) and Binks -	273.
— and Keane -	- 548		519. 527
— v. Massey -	44, 45. 502	Roll v. Osborne -	- 570, n.
— v. Wyatt -	36. 387	Romilly (Sir Samuel) v. James	316
Robertson and M'Dowgate 742		Rondeau v. Wyatt -	98. 105
Robins and Maberley 229. 514		Root and Pope -	- 243. 259
— and Sherwood -	- 37	Rorke v. Webb -	- 601
Robinson v. Anderton -	488, n.	Rosamond v. Lord Melsington	158
— and Bridges -	- 511	Rose v. Calland -	- 272. 314
— and Farmer -	- 98	— v. Cunynghame, 83. 88. 167.	
Robinson v. Harrington -	682		170. 180
Robinson v. Elliot -	- 304	— and Priddy -	- 729
— and Luxton -	- 226	Rosewell and Smith -	- 725
— v. Page -	- 130	Rosher and Headon -	- 250
Robotham and Hughes -	401	Ross and Lord Pengall, or	
Robson v. Brown -	- 165	Fingal -	- 113. 115
Robson v. Kemp -	762, 763	Ross v. Ross -	- 185
Roche v. O'Brien -	248. 616	Rosser v. Coombs -	- 308
Rochfort and Baldwin -	- 252	Rosswell v. Vaughan -	307. 494
Rodney (Lady) and Lord		Rotherham and Radnor, or	
Oxford -	- 179	Bodmin -	455, 456. 769
Roe v. Lowe -	- 186	Rothschild and Dolorct, 192. 368	

INDEX TO CASES.

lxi

	Page
Round <i>and</i> Cason -	770
— <i>and</i> Oldfield 24.	283. 289
— <i>and</i> Ortread -	189, 190
Routledge <i>and</i> Doe -	647. 659
— <i>v.</i> Grant -	82
Rowe <i>and</i> Atkins -	623
— <i>and</i> Jackson -	771
— <i>v.</i> Roach -	742
— <i>v.</i> Teed -	105
Rowlston <i>and</i> Roe -	352
Rowley <i>and</i> Cornish -	362. 370
Rowntree <i>v.</i> Jacob -	555, n.
Royal E.A. Office <i>and</i> Henkle	149. 159
— <i>and</i> Morse -	248. 616
Royse <i>and</i> Hamilton -	744. 757
Rucker <i>v.</i> Cammeyer -	97, 98
Rudd <i>and</i> Poole -	44
Rudele <i>and</i> Cass -	255
Ruffin <i>and</i> Hodder -	62
— <i>and</i> Nodder -	65
Rushley <i>and</i> Houghton -	688
Rushworth's case -	295
Russel <i>and</i> Bellew -	602
Russell <i>and</i> Stokes -	571
— <i>and</i> Western -	78. 86. 96.
	179, n. 242. 278
— <i>and</i> Webb -	399. 571
Rutherford <i>and</i> Loyes -	285
Rutland's (Countess of) case	137
Rutland (Duchess of) <i>and</i>	
Wakeman, 57.	342. 473, 474
Ryall <i>v.</i> Ryall -	628. 639
Ryde <i>and</i> Jones -	488
Ryder <i>v.</i> Gower -	62
— <i>v.</i> Wager -	173, 174
Ryle <i>v.</i> Brown -	284

S.

<i>Sabbarton v. Sabbarton</i>	814
-------------------------------	-----

	Page
Sacheverell <i>and</i> Davie -	576
Sadler <i>and</i> Bonnett -	201
Sadlier <i>and</i> Bullock -	647. 769
Saint Alban's (Duke of) <i>v.</i>	
Shore -	204. 226. 230. 233
Saint Cross (Master of) <i>v.</i> Lord	
Howard de Walden -	300
Saint John <i>v.</i> Champneys	786
— (Lord) <i>v.</i> Lady Saint	
John -	657
— <i>and</i> Rex -	453
— <i>v.</i> Bishop of Winton -	166
Saint John <i>and</i> Biddulph	707. 760
	764
Saint Paul <i>and</i> Brodie -	84
Saint Paul's (Dean and Chap-	
ter of) <i>v.</i> Dr. Betesworth	292
Sale <i>v.</i> Crumpton -	684
Sales <i>and</i> Goodright -	459
Salisbury <i>and</i> Goman -	138, 139
Salisbury (Lord) <i>v.</i> Wilkenson	512
Saltoun (Lady) <i>v.</i> Philips -	310
Salway <i>and</i> Foot -	127
Samborne <i>and</i> Oldin -	606
Sanders <i>v.</i> Deligne -	724
Sanderson <i>v.</i> Walker -	605
Sandford <i>and</i> Keech -	604
— <i>and</i> Willet -	169, n.
Sands <i>and</i> Attorney-General	401.
	451, 452. 459. 463. 465
Sandys <i>and</i> Montesquieu -	611
Sangon <i>v.</i> Williams -	185
Sarrell <i>and</i> Colman -	833
Savage <i>v.</i> Carroll 109.	121, 122.
	171. 180. 639
— <i>v.</i> Foster -	726
— <i>v.</i> Humble -	546
— <i>and</i> Jordan -	338
Savage <i>v.</i> Taylor -	175, n. 730
Savage <i>v.</i> Whitbread -	471
Saville <i>v.</i> Saville -	65, 241

	Page		Page
Saville <i>and</i> Goodtitle, 178, n.	240	Scott v. Tyler - - -	547
Saunders v. Lord Annesley	238.	Scrafton v. Quincey - -	701
	274, n. 357	Scroope v. Scroope - -	634
<i>Saunders v. Burroughs</i> -	604	Scrughan <i>and</i> Tardiffe	554, 555.
Saunders v. Dehew - -	732		558
— <i>and</i> Jerrard	723, 724. 770.	Sculthorpe <i>and</i> Phipps -	73
	772	Seabourne v. Powell - -	592
— v. Musgrave - - -	28	Seaforth (Lord), <i>ex parte</i> -	36
— Wakefield - - -	78	Seagood v. Meale	83. 88. 113. 116
Saunderson v. Jackson	86. 93, 94	Seale <i>and</i> Rogers - - -	772
<i>Sawbridge and Bret</i> - -	464	Seaman v. Vawdrey	294. 325. 328
<i>Sawbridge and Wanby</i> -	102	Searles <i>and</i> Newstead	651. 742
<i>Sawkins and Jordan</i> - -	136	<i>Secretan and Harrington</i> -	212
Say v. Barwick - - -	193	Seddon v. Senate -	576. 584.
— <i>and</i> Seal's (Lord) case	762	Sedgwick v. Hargrave -	189
Sayer <i>and</i> Doe - - -	234	— <i>and</i> Hithcox	449. 723. 749.
Sayle v. Freeland - - -	185		753
Scammonden (Inhabitants of)		Selby v. Chute - - -	577
— <i>and</i> Rex - - -	124	— <i>and</i> Lisney, or Risney	4, 5.
Scarborough (Earl of) <i>and</i>			307. 494
Worsley -	744, 745. 748	<i>Selby v. Selby</i> - - -	95
Schneider v. Heath -	30. 291	Selkrig v. Davies -	620, n.
— v. Norris - - -	93	Selleck <i>and</i> Jennings -	724
Schofield <i>and</i> Bayly -	678	Senate <i>and</i> Seddon -	576. 584
— <i>and</i> Kenworthy	86. 88. 100,	Senhouse v. Christian -	619
	101	— v. Earle - - -	660. 760
Scholes <i>and</i> Blackburn -	41	Sevier v. Greenway - -	240
Scholey <i>and</i> Metcalf -	478	Serjeant <i>and</i> Parker -	651
— <i>and</i> Scott - - -	ib.	Serra <i>and</i> Bascoi - -	757
Schulenburgh <i>and</i> Spenceley	763	Seton v. Slade	78. 164. 231. 366.
Scorbrough v. Burton -	519		370. 375. 381
Scott <i>and</i> Attorney-General	455, n.	Seward, or Stewart <i>and</i> Den-	
Scott v. Bell - - -	657	ton - - -	108. 218
— <i>and</i> Doe - - -	408. 425.	Seward v. Willock	232, 233. 372
— v. Fenhoulett -	460	<i>Sewell and Coussmaker</i> -	329
— v. Hanson - - -	284	Sewell v. Johnson - -	65
— v. Langstaffe - -	201	— <i>and</i> Legate - - -	185
— <i>and</i> Mountford -	744	Seymour v. Nosworth -	768
— v. Nisbitt - - -	60, 61	— v. Rapier - - -	145
— v. Scholey - - -	478	Shafto <i>and</i> Earl of Radnor	178, n.
— <i>and</i> Stapylton	210. 272. 315		181

	Page		Page
<i>les v. Shales</i> -	630. 632, 633, 634	<i>Shirley v. Davies</i> -	284
<i>Ilcross and Roffey</i> -	274	— <i>and Horniblow</i> -	266. 320
<i>Ilmer and Spalding</i> -	527, 528	— <i>and Nott</i> -	170
<i>Innon v. Bradstreet</i> -	122, 191	— <i>and Skipwith</i> -	469
<i>Ipland v. Smith</i> -	314. 346	— <i>v. Stratton</i> -	195. 241. 293
<i>Irpe v. Page</i> -	387	— <i>v. Watts</i> -	689
<i>Jarpe and Clay</i> -	331	<i>Shore and Duke of St. Alban's</i> -	204. 226. 230. 238
<i>Sharpe v. Roahde</i> -	520. 687	— <i>and Bateman</i> -	620, n.
<i>Shaw and Dickenson</i> -	631	— <i>v. Collett</i> -	469
— <i>v. Jakeman</i> -	155. 228	— <i>and James</i> -	270
— <i>and Morgan</i> -	211. 213	<i>Shovel (Sir C.) v. Bogan</i> -	294
— <i>and Williams</i> -	218	<i>Shrimpton and Conway</i> -	241
— <i>v. Wright</i> -	322	<i>Shum and Taylor</i> -	35
<i>Shearwood and Hare</i> -	151. 158	<i>Sibson v. Fletcher</i> -	725
<i>Shee and Hibbert</i> -	264	<i>Siddon v. Charnells</i> -	724
<i>Sheffield v. Lord Mulgrave</i> -	314. 372	<i>Sidley and Fletcher</i> -	637
<i>Shelburne (Countess) v. Earl of Inchiquin,</i> -	148. 150. 159, 160	<i>Sikes v. Lister</i> -	163. 182
<i>Sheldon v. Cox</i> -	707. 742	<i>Silcock and Snell</i> -	358
<i>Shelley's case</i> -	344	<i>Silk and Hunt</i> -	220
<i>Shelly v. Nash</i> -	251	<i>Silvester and Dyke</i> -	325
<i>Shelling v. Farmer</i> -	147	<i>Sime and Graham</i> -	388
<i>Shenton v. Jordan</i> -	205	<i>Simmons v. Cornelius</i> -	111. 123
<i>Shepherd v. Kain</i> -	292	— <i>and Farebrother</i> -	100
— <i>and Knollys</i> -	177	— <i>v. Hunt</i> -	488
<i>Sheppard v. Gosnold</i> -	149	<i>Simon v. Motivos</i> -	43. 98. 101
<i>Shergold and Poole</i> -	255. 268. 270	<i>Simons and Cutler</i> -	215
— <i>and Reid</i> -	726	<i>Simpson and Cowell</i> -	553
<i>Sheriffe and Jones</i> -	160	— <i>v. Gutteridge</i> -	335
<i>Sherly v. Fagg</i> -	724	— <i>and Hill</i> -	547
<i>Sherman and Cockes</i> -	738	— <i>and Pope</i> -	341. 368
<i>Sherard and Floyer</i> -	245	— <i>and Whorwood</i> -	244. 368
<i>Sherwin and Earl of Bath</i> -	203	<i>Sims and Wiltshire</i> -	41
<i>Sherwood v. Robins</i> -	38	<i>Singleton and Darley</i> -	245
<i>Shills and Grant</i> -	556	<i>Skelton and Smith</i> -	504
<i>Shine v. Gough</i> -	723. 731	<i>Skelton's case</i> -	212
<i>Shipman v. Thompson</i> -	389	<i>Skett v. Whitmore</i> -	625
<i>Shippey v. Derrison</i> -	86. 95	<i>Skillicorne and Rogers</i> -	528
		<i>Skinner and Burrough</i> -	42
		— <i>v. Stacy</i> -	237
		<i>Skipworth v. Shirley</i> -	469

	Page		Page
Slade <i>and</i> Jeudwine -	220	Smith <i>and</i> Marlow -	314. 322
—— <i>and</i> Seton -	78. 164. 231.	—— <i>and</i> Martin -	226. 231
	366. 370. 375. 381	Smith <i>and</i> Mole -	333
Slaughter <i>and</i> Patterson -	771	Smith <i>v.</i> Nelson -	57
Sleap <i>and</i> Lady Platt -	398	—— <i>and</i> Newall -	522
Slee <i>and</i> Croft -	830	—— <i>v.</i> Pierce -	391
Sloane <i>v.</i> Cadogan -	658	Smith (<i>Treasurer of the W. I.</i>	
Sloman <i>v.</i> Herne -	762	<i>D. C.</i>) <i>v. the City of London</i>	624
Sloper <i>v.</i> Fish -	314. 686	Smith <i>v.</i> Read -	711
Smallwood <i>and</i> Walker, 533.	745	—— <i>v.</i> Rosewell -	725
Small <i>v.</i> Jefferys -	618	—— <i>and</i> Shapland -	314. 346
Smallcomb <i>v.</i> Buckingham -	688	—— <i>v.</i> Skelton -	504
Smart <i>v.</i> Prujean -	173	—— <i>v.</i> Smith -	339
—— <i>and</i> Tanner -	87	—— <i>v.</i> Spooner -	742
Smartle <i>v.</i> Penhallow -	631	—— (<i>Lady</i>) <i>and</i> Symms -	389
Smith <i>v.</i> Baker -	625	—— <i>and</i> Thomlinson 550.	731
—— <i>and</i> Beatniff -	706	—— <i>v.</i> Turner -	109
—— <i>v.</i> Burnam -	366. 374	—— <i>and</i> Voll -	111. 123
—— <i>v.</i> Lord Camelford -	625	—— <i>v.</i> Watson -	88
—— <i>v.</i> Clarke -	23, 24	—— (<i>Sir William</i>) <i>v.</i> Wheeler,	545
—— <i>and</i> Cooper -	83. 87. 94	—— Wilkinson -	625
—— <i>and</i> Deacon 640, 641, 642		—— <i>v.</i> Woodhouse -	230
—— <i>and</i> Doe -	234	—— <i>and</i> Yems -	790
—— <i>and</i> De Graves -	5	Snag's case -	768
—— <i>v.</i> Sir Thomas Dolman 374		Snaith <i>and</i> Brooks -	60
—— <i>v.</i> Garland -	664	—— <i>and</i> Hogg -	125
—— <i>and</i> Gibson -	299	Snell <i>and</i> Silcock -	358
—— <i>and</i> Green -	162. 180	Snelling <i>v.</i> Squint -	748
—— <i>and</i> Growsock -	231. 508	Snow <i>and</i> Rex -	162, n.
—— <i>v.</i> Guyon -	527. 538	Sollet <i>and</i> Dale -	221
—— <i>and</i> Hartley -	315	Solomon <i>v.</i> Turner -	161
Smith <i>and</i> Hall -	9. 369. 756.	Soltan <i>v.</i> Cooke -	324
—— <i>v.</i> Hibbard -	163. 183. 342	Some <i>v.</i> Taylor -	301
	516. 551.	Somerset (<i>Duke of</i>) <i>and</i> Gour-	
Smith <i>v.</i> Jackson -	213	lay -	253
—— <i>v.</i> King -	355. 499	Sorrell <i>v.</i> Carpenter, 745.	747, 748
Smith <i>and</i> the King 449, n.	451	—— <i>and</i> Williams -	705
Smith <i>and</i> Kirkman -	185	Southcote <i>and</i> Harrison, 552.	711
Smith <i>v.</i> Leigh -	522	—— <i>and</i> Sweet -	738
Smith <i>v.</i> Lloyd, 43. 213, 214.	273	Southgate <i>and</i> Chaplain -	576
—— <i>v.</i> Low -	753	Southouse <i>and</i> Browne -	512

INDEX TO CASES.

lxv

Page	Page
S. S. Company, v. D'Oliff - 151	Stammers v. Dixon - 149
Sowarsby v. Lacy - 529	Standen and Standen - 830
Sowden v. Sowden - 641	Standley v. Hennington - 231
Sowerby v. Brooks - 749	Standon (Inhabitants of) and Rex - 73
Spaight and O'Connor - 136	Stanford and Walton - 736
Spalding and Shalmer 527, 528	Stangroom and Marquis of Townsend, 128, 129, 132. 150. 295
Sparrow v. Hardcastle - 169, n.	Stanhope's (Lord) case - 272
Speldt v. Lechmere - 728	Stanhope and Griffin - 656. 669
Spenceley v. Schulenburgh 763	— v. Earl Verney - 405. 439. 568. 729
Spencer and Fane - 312	Staniland and Parker - 76
— v. Marriott - 578	Stanley and Jones - 738
— v. Venacre - 675	Stanley v. Lee - 814, n.
Spencer's case - 571	Stansfield v. Johnson - 99. 101
Sperling v. Trevor - 330	Stanton and Lavender - 529
Spicer and Middleton - 164	Stapely and Butcher - 108. 741
Spiller v. Spiller - 206	Staple and Doe, 407. 408. 421, 423
Spillet and Lloyd - 625, 626	Stapylton v. Scott, 210. 272. 315
Spittle v. Lavender - 45	Statham and Joynes - 129
Spooner and Smith - 742	Statham and Conch - 339
Spratley v. Griffiths - 245	Staughton v. Hawley - 189, n.
Spratt v. Hobhouse - 668	Steadmon v. Lord Galloway 378
Spurrier v. Elderton - 42. 512	Stedman and Gough - 766
— v. Fitzgerald - 106	Steed v. Whitaker - 744
— v. Hancock 257. 341. 368	Steel and Wray - 629
— v. Mayoss - 515	Steele and Rivers - 747
Squint and Snelling - 748	Steere (or Stare) and Toul- min - 732. 743
Squire v. Baker - 242	Stent v. Baily - 255
— v. Tod - 225	Stephens v. Bateman - 245
Stabback v. Leatt - 331	Stephens v. Brydges - 401
Stackhouse v. Barnstone - 355	Stephens and Copeland - 46
Stace and Blackburne - 213	— v. Olive - 657
Stace and Doe - 430	— v. Stephens - App. n.
Stacpole and Gore - 51	— v. Truman - 832
Stacy and Skinner - 237	— and Vernon - 45
Stadd v. Cason - 764	Stephenson v. Esdale 208. 228. 373. 510
Stadt v. Lill - 78	
Stainbridge and Jolland, 485, 707. 744. 764.	
Staines v. Morris - 34. 388. 520	
Stanford and Best - 459	
— (Lord) and Pickering - 339	

	Page		Page
<i>Sterum and Colclough</i>	- 52	<i>Strathmore (Lady) v. Bowes</i>	
<i>Stevens v. Adamson</i>	- 286	(Ves. jun.)	- 457
— <i>v. Baily</i>	- 182	— (Earl of) <i>and Davis</i>	- 685
— <i>and Dobell</i>	- 4	<i>Stratton and Shirley</i>	- 195, 241.
— <i>and Guppy</i>	- 218, 343, 346		293
<i>Stevenson and Hayward</i>	- 649	<i>Stretton v. Stretton</i>	- 55
— <i>and Hesse</i>	- 153, 581, 589	<i>Street v. Brown</i>	- 227
— <i>and Morris</i>	- 188	<i>Stringer and White</i>	- 653, 724
<i>Stewart v. Alliston</i>	38, 271, n.	<i>Strode and Casamajor</i>	- 58, 318,
	273		319
— <i>and Bowles</i>	- 7, 8, 358	— <i>v. Lady Folkland</i>	- 147
— <i>v. Careless</i>	- 105	— <i>and Osgood</i>	- 653, 832
<i>Steward, or Seward and Den-</i>		<i>Stuart, ex parte</i>	- 468
<i>ton</i>	- 108, 218	<i>Stubbs and Mathews</i>	- 51
<i>Stibbert and Taylor</i>	- 733, 756	— <i>and Wall</i>	- 244
<i>Stileman v. Ashdown</i>	635, 656	<i>Studly and Fielder</i>	- 153, 592
<i>Stile and Taylor</i>	- 649	<i>Stukeley and Keen</i>	- 241
<i>Stiles v. Cowper</i>	- 123	<i>Stut and Gascoigne</i>	- 693, n.
— <i>and How</i>	- 402	<i>Style (or Stiles) v. Martin</i>	- 746
<i>Stilwell v. Wilkins</i>	- 245	<i>Suffolk and Harding</i>	- 143
<i>Stokes and Hamil</i>	- 729	<i>Sutton and Banks</i>	- 455
— <i>v. Moore</i>	- 84, 93, 95	— <i>and Blore</i>	- 84, 94, 218.
— <i>and Pentland</i>	- 706	— <i>v. Chetwynd</i>	- 666
— <i>v. Russell</i>	- 571	— <i>and Harker</i>	- 329
<i>Stonnard and Burtin</i>	- 546	— <i>and Kenyon</i>	- 170
<i>Stone and Sir George Binion</i>	603	<i>Surry and Klinitz</i>	- 44
— <i>and Gwillim</i>	- 218, 307	<i>Swaine and Zouch</i>	- 593
— <i>and Whiting</i>	- 73	<i>Swan v. Cox</i>	- 231
<i>Story v. Lord Windsor</i>	738, 767,	<i>Swannock v. Lifford</i>	- 455, 456
	768, 769	<i>Swan's case</i>	- 580
<i>Stourton (Lord) v. Sir Thomas</i>		<i>Sweet v. Southcote</i>	- 738
<i>Meers</i>	- 373, n.	<i>Swift v. Davis</i>	- 631, 632
— (Lord) <i>and Sir T. Meers</i>	373	— <i>and Garnons</i>	- 227
<i>Stowe's case</i>	- 300, n.	— <i>and Lightburne</i>	- 51
<i>Stradling and Wills</i>	- 108, 109	— <i>and Lowe</i>	- 122
<i>Strange and Price</i>	- 314	<i>Swinnerton and Butler</i>	- 578
<i>Stratford v. Bosworth</i>	- 82	<i>Swymmer and Goodright</i>	- 324
— <i>v. Powell</i>	- 157	<i>Sybourn and Doe</i>	- 423
— <i>v. Twyman</i>	- 601	<i>Sylvester and Dyke</i>	- 324
<i>Strathmore (Lady) v. Bowes</i>		<i>Symmons and Mackreth</i> , 551, 554	
(Term. Rep.)	- 172		558, 556, 568

INDEX TO CASES.

lxvii

	Page
Symms v. Lady Smith	- 389
Symonds v. Ball	- 101
Symondson v. Tweed	- 102. 120

T.

Tadman and Furguson	- 519
Tait v. Lord Northwick	- 63
Talbot and Duke of Chandos	33
— and Lindsay	- 762
Tankard v. Wade	- 407
Tankerville (Lord) and Bennett	127
Tanner and Chapman	- 551
— v. Florence	- 756
— and Meadows	- 26
— and Smart	- 87
Tapp v. Lea	- 5. 727, n.
Tappenden v. Randall	- 224
Tarback v. Marbury	- 669
Tardiffe v. Scrughan	554, 555. 558
Tasburgh and Lord Clermont,	195
Tatem v. Chaplin	- 571
Taunton and Adams	- 545
Tayler v. Waters	- 73
Taylor v. Alston	- 628
— and Attorney General	18
— v. Baker	- 755
— v. Beech	- 107
— v. Debar	- 592
— and Freeman	- 478, n.
— and Griffin	- 188
— v. Hawkins	- 550
— v. Horde	- 353
— v. Radd	- 150. 159
Taylor and Savage	175, n. 730
Taylor v. Shum	- 35
— and Some	- 301
— v. Stibbert	- 733. 756
Taylor v. Stile	- 649
Taylor v. Taylor	- 630. 632

Taylor v. Wheeler	- 727
Tawney v. Crowther	- 86
Teal and Bramby	- 215
Teasdale v. Teasdale	- 727
Tedcastle and Morgan	301, 302
Teed and Rowe	- 105
Tempest's case	- 593
Templar and Evelyn	- 649, 650, 651. 657
— and Hodges	- 684
Templer v. Maclachlan	- 487
Temple v. Brown	- 307. 385, n.
Tenant and Hearne	- 363
Tenant v. Jackson	- 527, n.
Tendring v. London	- 197
Terrel and Clarke	- 81
Terrie's case	- 402
Terry or Ferry v. Williams	226
Tewkesbury (Bailiffs, &c. of)	
— v. Bricknell	- 149
Teynham (Lady) v. Head,	184, n.
Thanet (Earl of) and Milward	364. 376
Thellusson v. Woodford	- 172
Thewer and Peacock	- 672
Thicknesse v. Vernon	- 617
Thistlewood, ex parte	245. 249
Thomas v. Cook	- 73
Thomas v. Davis	- 146. 154. 161
Thomas and Jones	- 769
— v. Pledwell	- 685
— v. Powell	- 497
— v. Thomas	- 144
— and Wynne	- 389
Thomlinson v. Smith	- 550. 731
Thompson and O'Reilly	- 110
— v. Towne	- 164
Thompson, or Bonham and Wil-	
— liams	- 378
Thompson and Shipman	- 389
Thomson v. Wilson	- 73
— and Collett	- 225

	Page		Page
Thomson v. Miles -	226. 264.	Townley v. Bedwell -	178. 509
	370	Townsend (Lord), and Gard-	
Thorne and Bullock -	- 670	ner -	- 641
Thorn and Newman -	- 398	— and Mackintosh -	620. n.
Thornhill and Fleureau, 198.	222,	Townsend (Marquis of) v. Bi-	
	223, 224. 513	shop of Norwich -	- 443
— v. Thornhill -	- 63	Townshend (Marquis of) v.	
Thorp v. Freer -	- 518. 521	Stangroom -	128, 129. 132
Thruxton v. Attorney-General			150. 295
	463, 464, 465	Townshend v. Townshend, 215.	507
Thwing and Gascoigne	625, 626	Townsend v. Townsend (Bro.	
Thynn v. Thynn -	- 622	C. C.) -	- 354
Tickner v. Tickner -	- 169	Tracey and Jenner -	- 355
Tiffin v. Tiffin -	459. 463, 464	— and Langton -	- 649
Till and Coslake -	- 368	Trapaud v. Cormick -	- 668
Tilsley ex parte -	- 64	Trecothick and Coles 80, 81.	94.
Tinney v. Tinney -	125. 339		97, 98, 99. 101. 115. 196. 242.
Tipping v. Gartside -	- 57		246. 600. 607
Titus and Parkins -	- 388	Tredennick and Dunbar, 616.	733
Tod and Squire -	- 225	Trefusis v. Clinton -	64
Todd and Burton 510; App. No.		Trenchard v. Hoskins -	590
	20.	Trent v. Hanning -	- 314
Todd v. Gee - 510; App. No. 20.		Tresham and Ekins -	- 3, 4
Todd v. Gee -	- 218. 274	Treswallen v. Penhules -	301
Tollet and Fletcher -	- 186	Trevalion and Putbury	169, n.
Tollett v. Tollett -	- 149. n.	Trevalyan and Gordon -	84
Tolson v. Kaye -	- 350	Trevanion v. Mosse -	- 768
Tombs and Cooke 78. 86. 88. 90.		Trevor and Hopson -	- 204
	108	— and Sperling -	- 330
Tomkies and Lloyd -	- 576	Trimmer v. Bayne -	- 563
Tomkins, ex parte 66; App. No. 11		Trimuel's (Commissioner) case	
Tomkins v. White -	- 270		165
Tomlin and Hearn 11. 233. 264		Tritton and Crofts -	- 236
Toole v. Medlicott -	- 108	Trower v. Newcombe 4. 38.	285
Topham and Capp -	17. 19	Truman and Stephens -	832
Toulmin and Hammond -	593	Tubbin and Preston -	743. 745
— and Langstroth -	- 41	Tuchin and Bartlett -	- 371
— v. Steere -	- 732. 743	Tucker and Dare -	34. 466
Tourville v. Naish -	729. 738	Tunbridge and Ramsbottom	91
Towgood and Anson -	- 55	Turner, ex parte -	- 528
Towne and Thompson -	164	— v. Back -	- 725

INDEX TO CASES.

lxix

	Page
<i>Turner v. Beaurain</i>	- 224. 265, 266. n.
<i>Turner v. Harvey</i>	- - 6
— <i>and Marwood</i>	- - 348
— <i>and Nash</i>	- - 227, n
— <i>r. Richardson</i>	- - 46
— <i>and Solomon</i>	- - 161
— <i>and Smith</i>	- - 109
<i>Turnour and Morison</i>	- 94. 96
<i>Turton v. Benson</i>	- - 729
<i>Tweddell r. Tweddell</i>	- 357
<i>Tweed and Symondson</i>	102. 120
<i>Twigg r. Fifield</i>	- - 55. 508
<i>Twining v. Morris</i>	21. 26. 195. 244. 275
<i>Twistleton v. Griffith</i>	- 247. 249
<i>Twyford v. Warcup</i>	- - 295
<i>Twyman and Stratford</i>	- 601
<i>Tyler v. Beversham</i>	- - 299
— <i>and Scott</i>	- - 547
<i>Tyndale v. Warre</i>	- - 61
<i>Tynman and Cooper</i>	- - 728
<i>Tyrconnel (Earl of) v. Duke of Ancaster</i>	- - 33
<i>Tyrer v. Artingstall, or Bailey</i>	383
<i>Tyrer and Onions</i>	- - 174

U.

<i>Ulrich v. Ditchfield</i>	- - 145
<i>Underhill v. Horwood</i>	- 245
<i>Underwood v. Lord Courtown</i>	706. 737
— <i>v. Hithcox</i>	- - 242
<i>Upcot and Coleman</i>	78. 80, 81
<i>Upton r. Basset</i>	- - 647
— <i>v. Lord Ferrers</i>	- 60. 63
— <i>and Watson</i>	- - 214
<i>Urmoston r. Pate</i>	- - 494

V.

<i>Vale r. Davenport</i>	- - 51
--------------------------	--------

	Page
<i>Vancouver v. Bliss</i>	10. 126. 272. 519, 520
<i>Vane v. Lord Barnard</i>	- 488. 743
<i>Vansittart v. Collier</i>	- - 52
<i>Varlo and Rex</i>	- - 149
<i>Vaughan and Evans</i>	- - 579
— <i>and Roswell</i>	- 307. 494
<i>Vawdrey and Seaman</i>	- 294. 325 328
<i>Vawser v. Jeffrey</i>	- - 173
<i>Venacre and Spencer</i>	- - 675
<i>Vendebendy and Bodmin, or Radnor</i>	- 455. 749
<i>Verlander v. Codd</i>	- - 86
<i>Vermedum and Gell</i>	- - 182
<i>Verney (Lord) v. Carding</i>	- 733
— <i>(Earl) and Stanhope</i>	405. 439. 568. 729
<i>Verner v. Winstanley</i>	- 240. 245
<i>Vernon, ex parte</i>	- 182. 625
— <i>and Atcherley</i>	- 162. 164, 165, 166
— <i>and Lord Hardwicke</i>	610. 612
— <i>v. Keys</i>	- - - 6
— <i>v. Stephens</i>	- - 45
— <i>and Thicknesse</i>	- - 617
— <i>v. Vernon</i>	- - 166
<i>Viger and Attorney-General</i>	173
<i>Villiers v. Villiers</i>	- - 463
<i>Vincent and West</i>	- - 64
<i>Viney and Neal</i>	- - 78
<i>Vizard v. Longdale</i>	- - 338
<i>Vizod v. Londen</i>	- - 338
<i>Voll v. Smith</i>	- - 111. 123

W.

<i>Waddington v. Bristow</i>	- 76
<i>Waddy v. Newton</i>	- - 76
<i>Wade and Beckford</i>	- 349. 356

	Page		Page
Wade v. Marsh - - -	238, n.	Walley v. Walley - - -	730
— and Tankard - - -	407	Wallinger v. Hilbert - 212.	272
Wadham and Heard - -	230, 231	Wallis and Harwood - - -	152
— and Roach - - -	572, 573	Wallwyn v. Coutts - - -	649
Wadsley and Mayfield -	77, 78	— v. Lee - - -	724. 766, 767
Wadsworth and Crosby -	76	— and Matthews - - -	705
— and Pindar - - -	326	Walmsley and Clifton - -	148
Wager and Ryder - - -	173, 174	Walpole (Lord) v. Earl of	
Waghorn and Kaye - - -	138	Cholmondeley - - -	144
Wagstaffe v. Read - - -	768, 769	Walsh v. Whitcomb - - -	389
Wain v. Warlters - - -	78	Walter v. Maunde - - -	9. 318
Wake and O'Dell - - -	687	Walters and Baglehole - -	289
Wakefield and Saunders -	78	— v. Morgan - - -	105
Wakeman v. Duchess of Rut-		— v. Pyman - - -	213
land - - -	57. 342. 473, 474	Walton v. Hobbs - - -	764
Walden (Lord Howard de) and		— v. Stanford - - -	736
Master of St. Cross - -	300	Wanby v. Sawbridge - - -	102
Waldron v. Forester - -	508. 517	Warcup and Twyford - - -	295
Waldron and Honeycomb -	701	Ward and Casberd - 449, n.	568
Walker v. Advocate-General	17	— and Callaway - - -	162
— v. Barnes - - -	236	— and Douglass - 651.	661
— v. Burrows - - -	636	— and Garth - - -	745
— and Boothby - - -	214	— v. Garnons - - -	469
— and Campbell, 599. 605. 612		— v. Moore - - -	170
— v. Constable - 99. 101. 142.		— and Newell - - -	532
	224	— and Read - - -	674
— and Only - - -	764, 765	— and Waring - - -	179
— v. Preswick - - -	566	Warde v. Jeffery - 366. 374.	381
— v. Smalwood - - -	533. 745	Wardell and Farmer - - -	248
— and Sanderson - - -	605	Waring v. Hoggart - - -	31, 32
— v. Walker - - -	94, n. 129	— v. Mackreth - - -	307
Walkley and Comer, or Currer		— v. Ward - - -	179
177, n. 502. 504. 511. 516.		Walters and Wain - - -	78
	538. 540. 557	Warner's case - - -	595
Wall v. Bright - - -	177	Warre v. Tyndale - - -	61
— v. Stubbs - - -	244	Warren and Dutch - - -	221
Wallace v. Cook - - -	389	— and Hall - 191. 200. 252	
Waller v. Hendon - - -	97	— and Proctor - - -	637
Waller and Hillary, 312. 324. 407		Warrington and Radcliffe	310. 364.
Waller v. Horsefall - -	227		367. 372
— and Pigott - 169. 172. 830		Warwick v. Bruce - - -	77

INDEX TO CASES.

lxxi

	Page
Warwick v. Warwick -	743. 760
Wase and Emery 187. 189, 190.	244. 252
Washington v. Brymer -	828
Watkins and Allpass -	228
— v. Cheek -	534
— v. Hatchet -	767, n.
— v. Maund -	679
Waterhouse and Buller -	669
— and Cass -	90. 299
Waters and Tayler -	73
Waterworth and Ripley -	177
Watt v. Grove -	599
Watts v. Creswell -	726
— v. Fullarton -	167
— and Jenkinson 167, 168, n.	
— v. Kancy -	546
— v. Martin -	63
— and Prosser -	329
— and Shirley -	689
Watson v. Birch -	61
Watson and Gell -	514
— and Gill -	215. 298
— and Smith -	88
— v. Upton -	214
Wayland and Wildgoose -	740
Weakley v. Bucknell -	645
Weal v. Lower -	185
Weare and Adams 241. 541	
— and Jerritt -	577
Webb v. Paternoster -	74
— v. Bettel -	232
— and Kirk -	626. 638
— and Potts -	366. 380
— and Raymond -	58
— v. Rorke -	601
— v. Russell -	399. 571
Wedderburne v. Carr -	97
Weildon and Farlow -	60
Weldon and How -	724
Welford v. Beazely -	88. 94. 759

	Page
Welland and Balfour -	531
Wells and Bally -	571
Welsh and Fowle -	576
Wenham and Kenney -	262
West v. Vincent -	64
Westcott and Beard -	814, n.
Westcott and Bradley -	830
Western v. Russell 78. 86. 179, n.	242. 278
Weston v. Berkeley -	770
— and Lyddal -	325. 328
— and Noel -	322. 388
Whale v. Booth -	549
Whaley v. Bagenel -	90. 108
Whalley v. Whaley -	730
Wheate and Burgess -	260
— v. Hall -	314
Wheeler v. Bramah -	46
— v. Collier -	80
— v. D'Esterre -	108
— and Harrington -	367
— v. Newton -	93. 188
— and Sir William Smith 545	
— and Taylor -	727
Whelpdale v. Cookson 609. 614	
Whichcote v. Lawrence 599. 605.	616
Whichcott and Duckenfield -	3
Whitackre v. Whitackre -	599
Whitaker and Steed -	744
Whitbread v. Brockhurst -	108
— and Savage -	471
Whitby and Parker -	249
Whitchurch v. Bevis 91. 104. 107,	108
— v. Whitchurch 459. 460. 461.	463
Whitcomb v. Foley -	213
— v. Minchin -	599
— and Walsh -	389
White's case -	194

	Page		Page
White and Cole - - -	108, 109	Wilde v. Fort - - -	225. 315. 362.
— v. Damon - - -	242		449, n. 510. 514
— v. Ewer - - -	355	Wildgoose v. Moore -	710, 711
— v. Foljambe - 310.	341.	— v. Wayland - - -	740
	520	Wildigos v. Keeble -	710
— v. Nutt - - -	255	Wilker v. Bodington -	417. 749
— v. Proctor - - -	99, 100	Wilkes and Redding -	108
— and Parkes - - -	599	Wilkenson and Lord Salisbury	
— v. Stringer - - -	653. 724		512
— and Tomkins - - -	270	Wilkins v. Fry - - -	35
White v White - - -	170	— and Jeanes - - -	692
White v. Wilson - - -	60. 62	— and Paul - - -	163
Whitehouse and Hinde , 83.	86.	— and Stilwell - - -	245
	88. 98. 101	Wilkinson and Hartley	103
Whiteing, or Edwards, and		— and Lush - - -	637
Hollis - - -	107	— and Wilmott - 305.	341
Whitfield v. Fausset - -	729	— and Smith - - -	625
Whiting and Stone - - -	73	Wilks v. Biscoe - - -	521
Whitmel v. Farrel - - -	204	— v. Davis - - -	253
Whitmore's case - - -	177	— v. Wilks - - -	642
Whitrong and Douglas -	ib.	Willan v. Willan - - -	195
Whitmore and Skett - - -	625	Willet v. Sanford - -	169, n.
Whittaker v. Whittaker , 171.	181.	William v. Nevil - - -	110. 123
	377	Williams v. Attenborough	55. 60
Whitworth (Lord) and Brookes		— and Calverley - - -	299. 521
	216. 217	— v. Carter - - -	198
— v. Davis - - -	162	— v. Chitty - - -	338
Whorwood v. Simpson - 244.	368	— and Cornwall - - -	198
— v. Whorwood - 641, 642,	643	— and Cunningham	54
		— and Edwards - 278.	383
Wickham v Everest - - -	213	— v. Lambe - - -	772
Widdrington and Christ's Coll.		— v. Llewellyn - - -	602
	764	— and Macnamara - -	217
Wigg v. Wigg - - -	738	— v. Millington - - -	41
Wightman and King - - -	267	— v. Prothero - - -	496
Wiglesworth and Gore -	733	— and Pyke - - -	108
Wigzell and Francis - - -	597	Williams and Rea - - -	617
Wihers v. Pinchard - - -	189	Williams and Reed - -	760
Wilcocks and Coke - - -	770	— and Sangon - - -	185
— v. Wilcocks - - -	640	— v. Shaw - - -	218
Wild and Henderson - -	555, n.	— and Terry, or Ferry	226

	Page
<i>Wolf and Burgh</i> - -	725
<i>Woollaston and Collet</i> -	242
<i>Wood v. Abrey</i> - -	249. 251
<i>Wood v. Birch</i> - -	621
<i>Wood v. Bernal</i> - -	266. 375
— <i>and Boehm</i> 211. 234.	382
— <i>and De Bernales</i> -	514
— <i>v. Downes</i> - -	611. 616
<i>Wood v. Griffith</i> 164. 236. 278.	496
<i>Wood and Green</i> - -	368
— <i>v. Lake</i> - -	73. 75
— <i>v. Norman</i> - -	621
— <i>v. Pollard</i> - -	559
<i>Woodford and Thellusson</i> -	172
<i>Woodgate v. Woodgate</i> -	526, n.
<i>Woodhouse and Harvy</i> -	724
— <i>v. Meredith</i> - -	599
— <i>and Smith</i> - -	230
<i>Woodie's case</i> - -	651
<i>Woodman v. Morrell</i> 632.	634
<i>Woodrow and Glazebrook</i>	230
<i>Woods v. Huntingford</i> -	179
<i>Woollain v. Hearn</i> - 128,	129
<i>Worcester (Bishop of) v.</i>	
<i>Parker</i> - -	724
<i>Wordsworth and Nicolson</i>	207
	545
<i>Worley and Hamilton</i> -	179
<i>Wormal and Wilson</i> 659.	689
<i>Worms and Granger</i> - -	31
<i>Wornacks and Bennett</i> -	32
<i>Worrall v. Jacob</i> - -	657
<i>Worsley and Hill</i> - -	745
— <i>and Cavendish</i> - -	185
— <i>and Norcliffe</i> - -	185
— <i>v. Earl of Scarborough</i>	744,
	745. 748
<i>Worthy and Duke of Norfolk</i>	31.
	38. 44. 47. 221. 285. 297
<i>Wortley v. Birkhead</i> - -	748

	Page
<i>Wray v. Steel</i> - -	629
— <i>v. Williams</i> - -	455
<i>Wrenham and Kenney</i> - -	509
<i>Wren v. Kirton</i> - 26. 55.	602
<i>Wright ex parte</i> - -	728
— <i>v. Bond</i> - -	210
— <i>and Browning</i> 153. 574.	585
— <i>and Birch</i> - -	237
<i>Wright and Burdett</i> - -	429
<i>Wright and Clerk</i> - 84.	108
— <i>v. Dannah</i> - -	100
— <i>and Fox</i> - -	251
— <i>and Freme</i> - -	341
— <i>and Harrison</i> - -	205
— <i>v. Howard</i> - -	368
— <i>v. Mayer</i> - -	762
— <i>and Needler</i> - -	731
— <i>and Parry</i> - -	732
— <i>and Quaintrell</i> - -	143
— <i>and Shaw</i> - -	322
<i>Wrightson v. Hudson</i> - -	704
<i>Wrigley and Andrew</i> 540. 547.	
	549, 550. 738
<i>Wroot and Doe</i> - -	407
<i>Wroughton and Hyde</i> -	212
<i>Wyatt v. Allen</i> - -	41. 97
— <i>v. Burwell</i> - -	708
— <i>and Rondeau</i> - 98.	105
<i>Wynn v. Morgan</i> - 370.	522
— <i>v. Williams</i> - 455.	534
<i>Wynne v. Griffith</i> - -	216
— <i>v. Thomas</i> - -	389
<i>Wyvill v. Bishop of Exeter</i>	258

Y.

<i>Yallop, ex parte</i> - -	728
— <i>and Douglas</i> - -	487
<i>Yardly and Drapers Com-</i>	
<i>pany</i> - -	756
<i>Yarworth and Nourse</i> - -	463
<i>Yates v. Farebrother</i> - -	43

	Page
29. c. 3. s. 14, 15. Judgments	682
s. 16. Execution	- 688
s. 17. Parol agree- ments, 83. 97. 102	
s. 18. Recognizances,	693
s. 25. Distribution	- 692

WILLIAM and MARY.

3. c. 14. Devises	- 505. 593
4 & 5. c. 20. - } Judg-	{ 683
7 & 8. c. 36. s. 3. } ments.	{ ib.

WILLIAM III.

11 & 12. c. 4. Papist Pur- chasers	- 598. 708. 709
---------------------------------------	-----------------

JAMES I.

21. c. 16. Limitation of Time,	304. 349. 352.
c. 19. s. 9. Judgments against Bankrupts	- 686
c. 19. Bankrupts	- 567. 636
s. 14. Purchasers from Bankrupts,	674 680
c. 24. Debtors dying in Execution	- 687

ANNE.

2 & 3. c. 4. Registry	- 693
5. c. 18. s. 11. } Registry	{ 486
6. c. 35. s. 28. }	{ 486. 693
7. c. 19. Infant Trustees	- 182
c. 20. Registry	693. 699. 700

GEORGE I.

	Page
3. c. 18. Papist Vendors	- 709
8. c. 25. s. 6. Judgments	- 682
9. c. 7. s. 4. Churchwardens	596

GEORGE II.

7. c. 20. Ejectments	- 236
8. c. 6. s. 33. Registry,	486. 693
14. c. 20. s. 4. Recoveries	- 712

GEORGE III.

16. c. . s. . Auctions	- 20
17. c. 26. Life Annuities, App. No. 12	
17. c. 50. s. 8. } Auctions. {	39
19. c. 56. s. 11. }	20
s. 12. }	16
s. 13. }	13
s. 14. }	ib.
s. 15. }	ib.
25. c. 35. Extents	- 67
27. c. 13. s. 36. } Auctions {	13
28. c. 37. s. 19. }	20
s. 20. }	16
29. c. 36. s. 4. Papist Ven- dors	- 709
31. c. 32. Papists	- 598
37. c. 14. } Auctions. {	13
41. c. 109. s. 2. }	600. n.
42. c. 93, s. 1. }	16
s. 2. }	ib.
c. 116. s. 113. }	14
43. c. 30. Papists	- 598. 711.
c. 75. Lunatics	- 191, n.
45. c. 30. Auctions	- 13
46. c. 135. Purchasers from Bankrupts	675. 680



So if, at the time of the contract, the vendor himself was not aware of any defect in the estate, it seems that the purchaser must take the estate with all its faults, and cannot claim any compensation for them.

And even if the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was acquainted with them, and did not disclose them to the purchaser; yet, if they were *patent*, and could have been discovered by a vigilant man, no relief will be granted against the vendor.

The disclosure of even *patent* defects in the subject of a contract, may be allowed to be a moral duty; but it is what the civilians term a duty of imperfect obligation. *Vigilantibus, non dormientibus jura subveniunt*, is an ancient maxim of our law, and forms an insurmountable barrier against the claims of an improvident purchaser.

In this respect, equity follows the law. But it has been decided, that if a vendor, during the treaty, industriously prevent the purchaser from seeing a defect which might otherwise have easily been discovered, he is not entitled to the extraordinary aid of a court of equity: and it is conceived, that he could not even sustain an action against the purchaser for a breach of the contract.

And if a vendor know that there is a *latent* defect in his estate, which the purchaser could not, by any attention whatever, possibly discover, it is not clear that he is not bound to disclose his knowledge, although the estate be sold, expressly subject to all its faults (*d*).

By the civil law, vendors were bound, to warrant both the title and estate against all defects, whether they were or were not conusant of them. To prevent, however, the inconveniences which would have inevitably resulted from this general doctrine, it was qualified by holding, that if

(*d*) See *post*, ch. 6. s. 2.

description (*j*). And a statement in the particulars of an advowson, that an avoidance of the preferment was likely to occur soon, was held to be so vague and indefinite, that the Court could not take notice of it judicially ; and that its only effect ought to have been, to put the purchaser upon making inquiries respecting the circumstances under which the alleged avoidance was likely to take place, previous to his becoming the purchaser (*k*). So a statement, that the property is uncommonly rich water meadow land, will not annul the contract, although the land is imperfectly watered (*l*).

But if a vendor affirm, that the estate was valued by persons of judgment, at a greater price than it actually was, and the purchaser act upon such misrepresentation, the vendor cannot compel the execution of the contract in equity (*m*), nor would he, it should seem, be permitted to maintain an action at law for non-performance of the agreement.

And a remedy will lie against a vendor, for falsely affirming that a greater rent is paid for the estate than is actually reserved (*n*) (I) ; because that is a circumstance within his own knowledge. The purchaser is not bound to inquire further : for the leases may be made by parol,

(*j*) *Brown v. Fenton*, Rolls, 383 ; S. C. MS.
23 June, 1807, MS. ; S. C. 14 Ves.
jun. 144.

(*k*) *Trower v. Newcome*, 3 Mer. 704. (*n*) *Ekins v. Tresham*, *ubi sup.* ;
Lysney v. Selby, 2 Lord Raym.
1118 ; 1 Salk. 211, S. C. nom.

(*l*) *Scott. v. Hanson*, 1 Sim. 13. *Risney v. Selby* ; *Dobell v. Stevens*,
3 Barn. and Cress. 623.

(*m*) *Buxton v. Cooper*, 3 Atk.

(I) In the 1st vol. of Coll. of Decis. p. 332, the following case is reported :—An heritor having solemnly affirmed to his tacksman at setting the lands, that there was paid, by the preceding tenants, for each acre, a great deal more than really was paid, and thereby induced him to take it at a very exorbitant rate, whereby he was leased *ultra dimidium* ; yet continued to possess two years before he complained. The Lords found the allegiance of circumvention and fraud, both in *consilio* and

and therefore, it is no excuse in the party, who made the representation, to say, that though he had received information of the fact, he did not at that time recollect it (*r*).

A *purchaser* is not liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers (*s*). Nor is a purchaser bound to acquaint the vendor with any *latent* advantage in the estate: for instance, if a purchaser has discovered that there is a mine under the estate, he is not bound to disclose that circumstance to the vendor, although he knows the vendor is ignorant of it (*t*). Equity will not, however, interfere in favour of a purchaser who has misrepresented the estate to any person who had a desire of purchasing it (*u*).

And a very little is sufficient to affect the application of this principle. If, it has been said, a word, a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate (*x*).

And if a purchaser conceal the fact of the death of a person of which the other is ignorant, and by which the value of the property is increased, equity will set aside the contract (*y*).

The same rules apply to incumbrances and defects in the title to an estate, as to defects in the estate itself. Both law and equity require the vendor to deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise; or to acquaint him with the facts, if they do not appear on the

(*r*) *Burrowes v. Lock*, 10 Ves. jun. 470, per Sir Wm. Grant.

(*s*) See *Vernon v. Keys*, 12 East, 632.

(*t*) See 2 Bro. C. C. 420.

(*u*) See *Howard v. Hopkyns*,

2 Atk. 371; and *Young v. Clerk*, Prec. Cha. 538.

(*x*) *Per* Lord Eldon, 1 Jac. 178.

(*y*) *Turner v. Harvey*, 1 Jac. 169.

chaser will be bound by it, although he himself was not aware of its existence.

And by these means, a purchaser may even deprive himself of the benefit to be derived from the estate lying in a register county: the register may be searched, and no incumbrance appear; yet, if the attorney have notice of any unregistered incumbrance, equity will assist the incumbrancer in establishing his demand against the purchaser(*d*).

Another powerful reason why a purchaser should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate, to which the attorney is privy, the purchaser, although it be proved that he was innocent, will be responsible for the misconduct of his agent(*e*). In one case(*f*) a purchaser lost an estate, for which he gave nearly 8,000*l.*, merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase money.

With the exception of a vendor, or his agent, suppressing an incumbrance, or a defect in the title, it seems clear, that a purchaser cannot obtain relief against a vendor for any incumbrance, or defect in the title, to which his covenants do not extend; and therefore if a purchaser neglect to have the title investigated, or his counsel overlook any defect in it, he appears to be without a remedy(*g*).

To sum up the foregoing observations,—a purchaser is entitled to relief, on account of any *latent* defects in the estate, or in the title to the estate, which were not disclosed to him, and of which the vendor, or his agent, was aware. In addition to this protection afforded him by the law,

(*d*) See *infra*, ch. 16, 17.

(*f*) Doe v. Martin, 4 Term

(*e*) See Bowles v. Stewart, Rep. 39.

1 Sch. and Lef. 227.

(*g*) See *post*, ch. 9.

the fact of him, *at the same time stating that he intends to purchase the estate*; and if the person of whom the inquiry is made has an incumbrance on the estate, and deny it, equity would not afterwards permit him to enforce his demand against the purchaser (*i*).

The inquiry should be made before proper witnesses; and as a witness may refresh his memory by looking at any paper if he can afterwards swear to the facts from his own memory, it seems advisable that the witnesses should take a note of what passes (*j*).

Where difficulties arise in making out a good title, the purchaser should not take possession of the estate until every obstacle is removed. Purchasers frequently take this step, under an impression, that it gives them an advantage over the vendor; but this is a false notion; such a measure would, in many cases, be deemed an acceptance of the title (*k*), or would at least be a ground to leave it to a jury, to consider whether the party had not taken possession with an intention to wave all objections. Where a purchaser, after delivery to him of the abstract, which disclosed a reservation of a right of sporting not noticed in the particulars by which he purchased, upon his application was let into possession, and paid the greater part of the purchase-money, without objecting to the right reserved, and apologized for not sending the draft of the conveyance, and afterwards raised the objection, he was held bound by his conduct, which was considered as a waiver of the objection; and although a clerk of the seller's solicitor wrote in answer to the purchaser's application for

(*i*) *Ibbetson v. Rhodes*, 2 Vern. 554; *Amy's case*, 2 Cha. Ca. 128, cited.

(*j*) See *Doe v. Perkins*, 3 Term Rep. 749, and the cases there cited; *Burrough v. Martin*, 1

Camp. Ca. 112.

(*k*) See 3 P.Wms. 193; *Calcraft v. Roebuck*, 1 Ves. jun. 226; 12 Ves. jun. 27; and *Vancouver v. Bliss*, 11 Ves. jun. 464.

the purchaser a priority over any former purchaser, or incumbrancer, who had neglected the same precaution (o).

It is very usual for auctioneers to prepare the particulars and conditions of sale ; but this a vendor should never permit, as continual disputes arise from the mis-statements consequent upon their ignorance of the title to the estate.

Where an estate has been in a family for a long time, or the title has not been recently investigated, it might be advisable for the owner to have an abstract of his title submitted to counsel, and any objections which occur to it cleared up, previously to a contract being entered into for sale of the estate. By this precaution, the vendor will prevent any delay on his part, which might impede the sale from being carried into effect by the time stipulated ; and will, in many cases, avoid the expense necessarily attending tedious discussions of a title. Another advantage of this measure is, that if there should be any defect in the title which cannot be cured, it would be known only to the agents and counsel of the vendor. It is of the utmost importance to keep defects in a title from the knowledge of persons not concerned for the owner. It has frequently happened, that persons concerned for purchasers, have communicated fatal defects in a vendor's title, to the person interested in taking advantage of them, by which many titles have been disturbed.

(o) *Vide infra*, ch. 16.

By an order of Lord Rosslyn's (*f*), it is directed, that upon application by a mortgagee of a bankrupt's estate, the mortgaged estate shall be sold before the commissioners, or by public auction, if they shall think fit. And it has been decided (*g*), that a sale of a mortgaged estate by auction, under this order, is liable to the auction duty, and is not within the exception in the acts of sales of bankrupts estates *by the order of the assignees*. This decision was made at *nisi prius*, and, perhaps, cannot be supported. The Legislature intended that the creditors of bankrupts should have the advantage of selling the estates by auction without being charged with the auction duty. Now this intention is, in the case under consideration, clearly subverted by the decision in *Coare v. Creed*. The argument was, that the sale was by the mortgagee, and so not part of the bankrupt's estate. But if the money produced by sale of the pledge is insufficient to cover the mortgagee's debt, he of course resorts to the general effects for a dividend on the residue. If the pledge produce more, the surplus sinks into the general fund; so that assuming, as the Legislature clearly did, that the auction duty is in substance a charge on the land, it in this case takes so much from the bankrupt's property, distributable for the benefit of his creditors. It was considered to be clear, however, that where the estate was sold by order of the assignees, with the consent of the mortgagee, no duty would be payable. But it has been decided, that a sale by assignees of an estate in fee, which was in mortgage for a term of years, was liable to the auction duty, because the assignees sold the whole estate, and they had only the equity of redemption (*h*). But the act of Parliament draws no such distinction. Most bankrupts estates are in mortgage; and

(*f*) 4 Bro. C. C. at the end.

(*h*) *Rex v. Abbott*, Excheq.

(*g*) *Coare v. Creed*, 2 Esp. Ca. Mich. T. 1816, MS; 3 Price, 178. 699.

money he receives at the sale. If he receive none, he may recover it from the vendor by action.

But if the owner of estates sold by auction, or any other person on his behalf, buy in the same, without fraud or collusion, no auction duty will become payable (*l*); provided notice be given in writing (*m*) to the auctioneer before such bidding, signed by the owner and the person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the sale for his use (*n*); and provided the delivery of such notice be verified by the oath of the auctioneer, as also the fairness of the transaction, to the best of his knowledge.

Neither will the duty be payable where the estate is bought in by or by the order of the steward (*o*) or known agent of the owner, actually employed in the management of the sale of such estate; but notice in writing of his intention must be given by the steward or agent, if he himself bid, or by him and the bidder, if he appoint a person to bid (*p*); and the delivery of such notice must be verified in the same manner as the delivery of a notice given by the owner. And to exempt a vendor from payment of the duty, every notice must, at the time appointed by law for the auctioneer's passing his account of the sale, be produced by the auctioneer to the officer authorized to pass the account of such sale; and also be left with the officer (*q*).

It is not necessary that the sale should be a regular auction. The acts apply to every mode of sale, whereby the highest bidder is deemed to be the purchaser. Therefore, where after an auction at which there was no bidding, the seller's agent stated that he should be ready to treat for the sale by private bargain, and the meeting broke up;

(*l*) 19 Geo. III. c. 56. s. 12.

(*m*) 28 Geo. III. c. 37. s. 20.

(*n*) See a form of such notice, Appendix, No. 1.

(*o*) 42 Geo. III. c. 93. s. 1.

(*p*) See forms of such notices, Appendix, Nos. 2 and 3.

(*q*) 42 Geo. III. c. 93. s. 2.

So biddings by several persons of sums marked upon a paper are within the act (*t*).

So in the case of a female auctioneer who continued silent during the whole time of the sale, but whenever any one bid, she gave him a glass of brandy: the sale broke up, and in a private room he that got the last glass of brandy was declared to be the purchaser. This was decided to be an auction (*u*).

But to bring a bidding within the acts, the sum must be named by the party *eo intuitu*, with a view to the purchase of the estate. Therefore, in the case of *Cruso v. Crisp* (*w*), it was decided, that *putting up* an estate in lots at certain prices was not a bidding within the acts; but this has since been doubted by Lord Eldon (*x*); and although it would be difficult to hold the transaction to be a sale within the act, yet of course, although the owner intends only to put up the estate at a certain price, and not to bid for it in case of an advance, a previous notice of his intention should be given.

If an estate be bought in by the owner, and proper notices were not given of his intention to bid, the sale will be held real, and the duty must be paid, however fair the transaction may be. The duty is made a *charge* on the auctioneer, which he must pay if the proper notices were not given. It is not given by way of *penalty*. In one case, an auctioneer who had neglected to require proper notices was compelled to pay 5 or 6,000*l.* out of his own pocket for the duty, although he had not received any part of it from the owners, nor had charged any commission, as the estates were not actually sold (*y*).

And a statement by an auctioneer to the vendor or his

(*t*) Attorney-General v. Taylor,
13 Price, 636.

(*u*) 1 Dow, 115.

(*w*) 3 East, 337.

(*x*) 1 Dow, 114.

(*y*) Christie v. Attorney Gen.
6 Bro. P. C. by Toml. 520; see
3 Ves. jun. 625, n.

ioneer, and he cannot recover under the undertaking, because it is illegal to indemnify against *penalties* (*d*). But to this it may be objected, that the duty attaches as a charge, and is not imposed as a penalty (*e*).

If the vendor's title prove bad, the auction duty will be allowed ; provided complaint thereof be made before the Commissioners of Excise, or two justices of the peace within whose jurisdiction such sale was made (*f*), within twelve calendar months after the sale, if the same shall be rendered void in that time ; or otherwise within three months after the discovery of the owner having no title (*g*). But the commissioners will not allow the duty unless they think that the vendor has used his *utmost exertions* to make a good title. An appeal, however, lies from the judgment of the commissioners : but as the King never pays costs, they fall upon the vendor, and in many cases would amount to more than the duty itself.

II. According to Cicero (*h*), a vendor ought not to appoint a puffer to raise the price, nor ought a purchaser to appoint a person to depreciate the value of an estate intended to be sold. And Huber lays it down (*i*), that if a vendor employs a puffer he shall be compelled to sell the estate to the highest *bonâ fide* bidder ; because it is against the faith of the agreement, by which it is stipulated that the highest bidder shall be the buyer.

In *Bexwell v. Christie* (*j*), Lord Mansfield and the other Judges of B. R. followed the rule of the civil law, and treated a *private* bidding, by or on the behalf of the vendor, as a fraud ; but the Legislature, by the subsequent

(*d*) *Owen v. Parry*, Sitt. West. Dec. 6, cor. Lord Ellenborough.

(*e*) *Christie v. Atty. Gen.* 6 Bro. P. C. by Toml. 520. *et supra*.

(*f*) 19 Geo. III. c. 56. s. 11.

(*g*) 28 Geo. III. c. 37. s. 19.

(*h*) De Off. l. 3.

(*i*) Prælectiones, xviii. 2. 7.

(*j*) H. 16 Geo. III; Cowp.

395.

pressed his opinion, that the doctrine was not in the least impeached by the acts of Parliament.

But in the case of *Conolly v. Parsons* (*m*), Lord Rosslyn said, he fancied the foregoing case turned on the circumstance that there was no real bidder; and the person refused instantly. It was one of those trap auctions which are so frequent in this city. The reasoning went large, certainly, and did not at all convince him. He said, he should wish it to undergo a re-consideration; for if it was law, it would reduce every thing to a Dutch auction, by bidding downwards (*I*). He felt vast difficulty to compass the reasoning, that a person does not follow his own judgment because other persons bid; that the judgment of one person is deluded and influenced by the biddings of others. The facts of the case of *Conolly v. Parsons* do not appear in the report; but I learn, that there was a contest between real bidders, after the person, employed to bid on the part of the vendors, had desisted from bidding. The suit was compromised by the purchaser paying a con-

(*m*) 3 Ves. jun. 625, n.

(*I*) A sale of this nature is thus conducted: The estate is put up at a high price, and if nobody accept the offer, a lower is named, and so the sum first required is gradually decreased, till some person close with the offer. Thus there is of necessity only one bidding for the estate, a mode of sale which, in this country, would attract few bidders. In some counties in England a singular mode of sale of estates for redemption of land-tax is adopted; the auctioneer states the sum of money wanted, and the number of acres to be disposed of, and the person who will accept the least quantity of land for the sum required, is declared the purchaser; so that the persons bid downwards, until some one name a quantity of land less than any other will take.

The manner of conducting sales by auction of the post-horse duties is at once Dutch and English. The duties are put up at a large sum, named in the particulars, and the sale is then conducted in the same manner as a Dutch auction: but when any person actually bids, others may advance on that bidding, and the highest bidder is declared the purchaser; just as if the sale had been conducted in the usual way.

diately preceding that of the purchaser was fictitious (*p*); and where public notice has been given, the contract will be binding on the purchaser, although there was no contest between real bidders; but only the purchaser and the person employed to bid, bid against each other (*q*). It should seem that the rule would be the same, even where public notice had not been given, provided the bidder was appointed only to protect the vendor's interest.

But it seems, that where the person is employed, not for the defensive precaution, with a view to prevent a sale at an undervalue, but to take advantage of the eagerness of bidders to screw up the price that will be deemed a fraud (*r*).

Neither do the cases authorize the vendor to appoint more than one person on his behalf. It seems highly proper that a vendor should be permitted to appoint a person to *guard* his interests against the intrigues of bidders; but it does not follow that he may appoint more than one. The only possible object of such a proceeding is fraud. It is simply a mock auction; and, notwithstanding Lord Rosslyn's impression, it is universally felt and acknowledged, that the judgments of most men are deluded and influenced by the biddings of others. As far as any aid is sought from the auction-duty acts, in support of private biddings on behalf of the owner, it is clear that they do not authorize or sanction the appointment of more than one person. In the report of *Conolly v. Parsons* it is stated, that *persons* were employed to bid, and did bid for the vendors; but the fact is, that one person only was employed by them, and actually bid on their behalf. The Master

(*p*) *Smith v. Clarke*, 12 Ves. jun. 477.

(*q*) *Oldfield v. Round*, 5 Ves. jun. 508.

(*r*) See 12 Ves. jun. 483. In *Fitzgerald v. Forster*, 31st July,

1813, the Vice-Chancellor seemed rather to be of opinion that the appointment of one puffer was, in no case, bad; but see *Crowder v. Austin*, 3 Bing. 368, *contra*.

chaser, if any person were employed as a puffer, and actually bid at the sale. This was actually decided in the late case of *Meadows v. Tanner* (*w*). The Vice-Chancellor said, that the plain meaning of the words *without reserve*, in a particular of sale, is, that no person will be employed to bid on behalf of the vendor for the purpose of keeping up the price; and that the vendor could have no claim to the aid of a court of equity to enforce a contract against the purchaser, into which he might have been drawn by the vendor's want of faith.

It is generally understood, that some person will bid on the part of the owner; and it therefore seems to deserve consideration, whether it would not, in most cases, be advisable to give public notice of the owner's intention previously to the sale. Where public notice is given, the mode least liable to objection seems to be that of reserving a bidding, or stipulating in the conditions of sale, that the owner may bid once in the course of the sale (*x*). It may here, however, be proper to observe, that buying-in an estate, especially where it is done without public notice, mostly prejudices a future sale. This was exemplified in the sale of an estate before one of the Masters in Chancery, where 23,000 *l.* was *bonâ fide* bid, and the estate was bought in by the agent of the vendor; afterwards there were three other sales in the Master's office; and the consequence of the estate having been bought-in deterring others from bidding, was, that on the two first occasions no more was offered than 12,000 *l.* and 6,000 *l.*; and the estate finally sold for 15,000 *l.* (*y*)

On the other hand, if a purchaser by his conduct deter other persons from bidding, the sale will not be binding. Thus, where upon a sale by auction of a barge,

(*w*) 5 Madd. 34.

(*x*) See Cowp. 397.

(*y*) See 6 Ves. jun. 629; C. C. 326.

Wren v. Kirton, 8 Ves. jun. 502;
and see *Twining v. Morris*, 2 Bro.

landlord and tenant, and the sum payable will be recoverable as rent (c).

Great care, however, should be taken to make the particulars and conditions accurate; for the auctioneer cannot contradict them at the time of sale, such verbal declarations being inadmissible as evidence.

Thus, where estates were put up to sale by auction (d), and in the printed particulars of sale were stated *to be free from all incumbrances*, they were bought by a person who, discovering that there was a charge on the estate of 17 *l.* per annum, refused to complete the purchase, in consequence of which, an action was brought by the vendor; and although he offered to give in evidence, that the auctioneer had publicly declared from his pulpit in the auction-room, when the estate was put up, that it was charged in the manner above specified, yet the court of C. B. refused to admit the evidence, as it would open a door to fraud and inconvenience, if an auctioneer were permitted to make verbal declarations in the auction-room, contrary to the printed conditions of sale; and the plaintiff was nonsuited. And this rule prevails in favour as well of the seller as of the purchaser (e).

The same rule of course prevails in equity, where the person setting up the parol evidence is plaintiff. Upon the sale of an estate by auction the particular was equivocal as to the woods: but it was clear the purchaser was to pay for timber and timber-like trees. There was a large underwood upon the estate. At the sale, the article being ambiguous, the auctioneer declared he was only to sell the land; and every thing growing upon the land must be paid for. The *defendant*, the purchaser, insisted he was

(c) *Saunders v. Musgrave*, 3 Campb. Ca. 285, 6.
6 Barn. & Cress. 524.

(e) *Powell v. Edmunds*, 12

(d) *Gunnis v. Erhart*, 1 H. East, 6.
Black. 289; see *Jones v. Edney*,

The late Mr. Bradley recommended, that where it is understood, at the time of sale, that the vendor has only a doubtful title, a provisional clause, to the following effect, should be inserted in the conditions of sale and articles of purchase; which would be sufficient, he thought, to obviate any doubt that might otherwise arise at the sale :

“ That if the counsel of the purchaser shall, on the examination of the title, be of opinion that a good title and conveyance cannot be made of the purchased premises, within the time limited by the articles for carrying the same into execution ; in that case, the same articles shall be discharged, and not further proceeded in on either side.”

The estate cannot be too minutely described in the particulars ; for although, as Lord Thurlow observed, it is impossible that all the little particulars relative to the quantity, the situation, &c. should be so specifically laid down, as not to call for some allowance and consideration, when the bargain comes to be executed (*l*) ; yet, if a person, however unacquainted in the actual situation of his estate, will give a description, he must be bound by that, whether consistent of it or not (*m*).

Lord Ellenborough has observed, that a little more fairness on the part of auctioneers, in the forming of their particulars, would avoid many inconveniences. There is always either a suppression of the fair description of the premises, or there is something stated which does not belong to them ; and in favour of justice, considering how little knowledge the parties have of the thing sold, much more particularity and fairness might be expected. The particulars, his Lordship added, are in truth like the

(*l*) See 1 Ves. jun. 224, *per* Lord Thurlow ; *Schneider v. Lord Thurlow*. Heath, 3 Camp. Ca. 506.

(*m*) See 1 Ves. jun. 213, *per*

charges, not according to the custom of the country, as tithes, poor-rates, church-rates, &c. which are natural charges on the tenant (*r*).

The mere exhibition of a plan of a new street, at the time of the sale of a piece of ground to build a house in the line of the intended street, does not amount to an implied contract to execute the improvements exhibited on the plan, where the written contract is silent on that head (*s*).

Where the timber and other trees are to be taken by the purchaser at a valuation, it should be stated accurately for what trees he is to pay.

In a case where there were several lots, it was stated after two of them, that the timber on them was to be paid for. The particulars were silent as to the timber on the other lots, which was of considerably greater value; but there was a general condition that all the timber and timber-like trees, down to 1 s. per stick inclusive, should be taken at a fair valuation. The purchaser of the lots, to which no statement was annexed, claimed the timber without paying for it; and the Master of the Rolls thought that a purchaser might be so fairly impressed with that idea, notwithstanding the general condition, that he refused to compel him to perform the contract according to the seller's construction (*t*).

But although it should be merely stipulated that the purchaser shall pay for *timber*, yet he must pay for trees not strictly timber, if considered so, according to the custom of the country (*u*).

(*r*) *Earl of Tyrconnel v. Duke of Ancaster*, Ambl. 237 ; 2 Ves. 500.

(*s*) *Feoffees of Heriott's Hospital v. Gibson*, 2 Dow, 301 ; see *Compton v. Richards*, 1 Price, 27. *Beaumont v. Dukes*, 1 Jac. 422.

(*t*) *Higginson v. Clowes*, 15 Ves. jun. 516.

(*u*) *Duke of Chandos v. Talbot*, 2 P. Wms. 601 ; Anon. Ch. 25 July, 1808 ; *Rabbett v. Raikes*, Woodfall L. & T. 224. 6th ed. ; and see *Aubrey v. Fisher*, 10 East, 146.

for re-entry if any business but that of a victualler should be carried on in the house (*q*).

In a case where the original lease contained a power of re-entry if certain trades were carried on upon the property, and the lessee granted under-leases containing no such stipulation, and upon a sale by the assignee of the original lessee, the conditions of sale stated the covenant in the original lease, and that such covenant would be inserted in the under-leases to be granted to the purchasers, but no mention was made whether the covenant was inserted in the under-leases already granted, the purchaser was allowed to recover his deposit from the auctioneer (*r*). Lord Tenterden observed, that he was of opinion that it is the duty of every person truly and honestly to represent that which he is to sell. A careful man and a lawyer looking at these conditions of sale might ask what were the terms of the leases which had been granted: The purchaser is informed by the statement in the conditions, that the original lessee is restrained from carrying on these obnoxious trades, and that in the leases to be granted to him a similar covenant is to be entered into. None but a very careful person would suppose that it could be doubtful whether the persons to whom under-leases had already been granted were bound in the same manner. He was, therefore, clearly of opinion that the plaintiff could not be bound to take the title.

In stating an estate to be of any given "clear" yearly rent, the parties should attend to the meaning of the word "clear," in an agreement between buyer and seller; which is clear of all outgoings, incumbrances, and extraordinary

(*q*) *Bennett v. Wornack*, 7
Barn. & Cress. 627.

(*r*) *Waring v. Hoggart*, 1 Ry.
& Mood, 39.

r into such a covenant for their indemnity or the indemnity of the bankrupt (c).

and although a purchaser is not required by the conditions of sale to give an indemnity against the rent and covenants, and an assignment is actually executed without indemnity being given ; yet, even a verbal agreement by the purchaser, before the sale, to secure such indemnity, will be carried into a specific execution, if it be distinctly proved (d).

Where a vendor is only an assignee of a leasehold estate, and is not bound by covenant to pay the rent, and perform the covenants in the lease, his liability to do so ceases upon his assigning the estate over (e), and consequently, in such case, there is not any thing for a purchaser to indemnify against. It has lately been decided that the assignee is liable to indemnify the lessee who assigned to him against breaches *during the time he (the assignee) is in possession*, although he has not covenanted to indemnify the lessee (f).

It should always be stated in the conditions, that the conveyance shall be prepared *by* and at the expense of the purchaser (g).

The usual condition, " that if the purchaser shall fail to comply with the conditions, the deposit shall be forfeited, and the proprietors be at liberty to re-sell the estate ; and the deficiency, if any, by such sale, together with all charges attending the same, shall be made good by the defaulter," should never be omitted. It forms a lien on the estate for the purchase-money, &c. and if the purchaser do not comply with the conditions, the vendor

(c) *Wilkins v. Fry*, 1 Mer. 244.

(d) *Pember v. Mathers*, 1 Bro. C. C. 52 ; and see *post*, ch. 3.

(e) See 1 Treat. Eq. 2d ed. p. 350, and Fonbl. n. (y) *ibid.* ; and

see *Taylor v. Shum*, 1 Bos. & Pull. 21.

(f) *Burnett v. Lynch*, 5 Barn. & Cress. 589.

(g) See *post*, ch. 4.

It is proper, also, to make some provision as to articles not properly fixtures. Lord Hardwicke said, that if a man sells a house where there is a copper, or a brew-house where there are utensils, unless there was some consideration given for them, and a valuation set upon them, they would not pass (*w*). But in the absence of any stipulation, common fixtures would pass to the purchaser under the common conveyance (*x*).

When the title-deeds cannot be delivered up, some provision should be made as to the expense of the attested copies, and the covenants to produce them, which will otherwise fall upon the vendor (*y*); and where the estate is sold in many lots, and the title-deeds are numerous, nearly the whole purchase-money may, perhaps, be exhausted. In one case, the lots were more than 200, and the copies came to 2,000*l*.

If the estate is leasehold, and the vendor cannot procure an abstract of the lessor's title, this fact should be stated in the conditions (*z*).

A purchaser of a leasehold estate must covenant with the vendor to indemnify him against the rent and covenants in the lease, although he is not expressly required to do so by the conditions of sale (*a*); and it will not vary the case that he is not entitled to any covenants for title; for example, where the sale is by an executor of an assignee (*b*); but assignees of a bankrupt selling a lease which was vested in him, cannot require the purchaser to

(*w*) *Ex parte* Quincey, 1 Atk. 478.

(*x*) *Colegrave v. Dias Santos*, 2 Barn. & Cress. 76.

(*y*) *Dare v. Tucker*, 6 Ves. jun. 460; and *Berry v. Young*, 2 Esp. Ca. 640, n. See *post*, c. 9.

(*z*) See *post*, ch. 7; and see *Denew v. Deverell*, 3 Camp. 451.

(*a*) See *Pember v. Mathers*, 1 Bro. C. C. 52; and see *post*, ch. 4, as to the obligation of a purchaser of an equity of redemption to indemnify the vendor against the mortgage-money.

(*b*) *Staines v. Morris*, 1 Ves. & Beam. 8.

may, by virtue of this stipulation, re-sell the estate, and recover the deficiency and charges from the purchaser (*h*). And if the money produced by the second sale exceed the original purchase-money, the purchaser who has violated the agreement will not be entitled to the surplus, but the vendor himself will be entitled to retain it.

A stipulation in a contract that in case the vendor cannot deduce a good title, or if the purchaser shall not pay the money on the appointed day, the agreement shall be void, does not enable either party to vitiate the agreement, by refusing to perform his part of it: the seller may avoid the contract, if the purchaser do not pay the money; the purchaser may avoid it, if the seller do not make a title; or the contract will be void, if the seller *cannot* make a title; but it is not sufficient for him to *say* that he cannot (*i*).

If the purchaser, after breaking the condition, become bankrupt, and the estate is re-sold at a loss, the expenses of the sale, &c. being in the nature of unliquidated damages, cannot be proved under the commission; but as the vendor has a lien on the estate, he may apply the money produced by the last sale of the estate, first, in payment of those articles which it is just he should receive, but which he could not prove under the bankruptcy; then towards payment of the original purchase-money; and the balance may be proved under the commission (*k*).

In a recent case (*l*), a leasehold house and furniture had been sold for 4,370*l.* and *the assignment was executed*, but neither it nor the lease, nor possession, had been

(*h*) *Ex parte* Hunter, 6 Ves. jun. 94; and see Moss *v.* Matthews, 3 Ves. jun. 279; Mertens *v.* Adcock, 4 Esp. Cas. 251; *sed vide* 7 Ves. jun. 275; see Greaves *v.* Ashlin, 3 Camp. 466.

(*i*) Roberts *v.* Wyatt, 2 Tau. 268.

(*k*) *Ex parte* Hunter, 6 Ves. jun. 94; Bowles *v.* Rogers, *ibid.* 95, n.; 1 Cooke, 123.

(*l*) *Ex parte* Lord Seaforth, 1 Rose, 306; *Ex parte* Gyde, 1 Glyn & Jam. 323.

being in the neighbourhood of a borough town. In the former case, the contract remained in force, but in the latter case the plaintiff was to be relieved from it, and was entitled to recover back his deposit. The plaintiff had a verdict; so that the jury must have thought the misdescription fraudulent (*m*).

And although, the condition as usual provide for payment of a compensation, yet the sale will be void if from the nature of the case no estimate can be made of the diminution in value. Thus, where a reversion was sold after the death of a person aged sixty-six, in case he should not have children, it turned out that he was only sixty-four, and Lord Tenterden held, that the sale was void. He said that in the case of a reversion simply expectant on the death of an individual, if a mistake be made in his age, a compensation may be made under the condition, for the difference of value may be computed; but where there is an additional contingency, such as that of the birth of future children, in this case the difference of age alters the likelihood of that contingency, and in such a case therefore no estimate can possibly be made of the difference of value between the thing described and the thing sold, and the contract itself must be vacated (*n*).

A bidding at a sale by auction may be countermanded at any time before the lot is actually knocked down (*o*); because the assent of both parties is necessary to make the contract binding; that is signified, on the part of the seller, by knocking down the hammer. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is

(*m*) Duke of Norfolk v. Worthy, 1 Camp. Ca. 337; see Fenton v. Brown, 14 Ves. jun. 144; 1 Ves. and Bea. 377; Stewart v. Alliston, 1 Mer. 26; Trower v. Newcome, 3 Mer. 704.

(*n*) Sherwood v. Robins, 1 Mood. & Malk. 194.

(*o*) Payne v. Cave, 3 Term Rep. 148; see Routledge v. Grant, 4 Bing. 653. As to goods, see Phillips v. Bistolli, 3 Dowl. & Ry. 822.

cannot, under the common condition, recover it from the *purchaser*, as he is called, because, although the highest bidder, he is *not* the purchaser (*r*).

The other provisions which ought to be inserted in conditions of sale, are so well known as not to require notice.

IV. It frequently happens that estates advertised to be sold by auction, are sold by private contract, instead of being brought to the hammer, and the sale is not announced to the public till the day fixed for the auction, and even sometimes not till the auctioneer's appearance in the auction-room. Notice of an intended sale by auction is said to be a contract with all the world : and the parties to whom the notice is addressed ought not to be put to the expense and trouble of attending the auction unless the sale is to take place. It should be stated, therefore, in the advertisements, that the estate will be sold by auction at the place and time fixed upon, *unless previously sold by private contract ; in which case notice of the sale shall be immediately given to the public* : and notice should be given accordingly.

If an auctioneer sell an estate without a sufficient authority, so that the purchaser cannot obtain the benefit of his bargain, he (the auctioneer) will be compelled to pay all the costs which the purchaser may have been put to, and the interest of the purchase-money, if it has been unproductive (*s*).

If an attorney or agent bid more for an estate than he was empowered to do, he himself would be liable ; but it seems that his principal would not (*t*). But unless he were expressly limited as to price, and not enabled to go

(*r*) Jones v. Nanney, 13 Pri. and see Nelson v. Aldridge, 2 Stark. 435.
76.

(*s*) Bratt v. Ellis, MS.; Jones (t) See Ambl. 498; 10 Ves.
v. Dyke, MS. App. Nos. 7 and 8; jun. 400.

The auctioneer should not part with the deposit until the sale be carried into effect (*c*); because he is considered as a stakeholder, or depositary of it (*d*). In a late case, where the auctioneer was also the attorney of the seller, and paid over the money to the seller, after he knew that objections to the title had been raised, an action against him for the deposit was sustained, but the Judges cautiously abstained from pointing out the duty of an auctioneer in any other case (*e*). However, in a later case, where the auctioneer had paid over the deposit to the vendor, without any notice from the purchaser not to do so, and before any defect of title was discovered, it was held that the purchaser (the title being defective,) might recover the deposit from the auctioneer (*f*).

If both the parties claim the deposit, the auctioneer may file a bill of interpleader, and pray an injunction, which will be granted, upon payment into court of the deposit (*g*).

But an auctioneer cannot maintain a bill of interpleader if he insist upon retaining out of the deposit either his commission or the auction duty; for interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants (*h*).

If upon a bill filed for an injunction, the Court order the deposit to be paid into court, it will, it seems, be after

(*c*) *Burrough v. Skinner*, 5 Burr. 2639; *Berry v. Young*, 2 Esp. Ca. 640, n.; *Spurrier v. Elderton*, 5 Esp. Ca. 1; and see *post*, ch. 10.

(*d*) *Jones v. Edney*, *cor.* Lord Ellenborough, 4 Dec. 1812.

(*e*) See *Edwards v. Hodding*, 5 Taunt. 815; 1 Marsh. 377.

(*f*) *Gray v. Gutteridge*, 1 Mann. and Ryl. 614.

(*g*) *Farebrother v. Prattent*, 5 Price, 303; 1 Dan. 64.

(*h*) *Mitchell v. Hayne*, 2 Sim. & Stu. 63; but as to the auction duty, see *Farebrother v. Prattent*.

Where a man is completely the agent of the vendor, a payment to him is in law a payment to the principal; and in an action against the latter for recovery of the deposit, it is immaterial whether it has actually been paid over to him or not(*p*).

It may here be remarked, that a deposit is considered as a payment in part of the purchase-money(*q*), and not as a mere pledge; which was also the rule of the civil law, where money was given; but if a ring, &c. was given by way of earnest, or pledge, it was to be returned(*r*).

If, pending a suit for specific performance, a deposit be laid out in the public funds, under the authority of the Court, it will be binding on both vendor and vendee; and, if laid out without opposition by the seller, it must be presumed to be with his assent; and, in either case, he must take the stock as he finds it(*s*).

If a purchaser is entitled to a return of his deposit, he is not compellable to take the stock in which it may have been invested, unless such investment were made under the authority of the Court, or with his assent. And an assent will not be implied against a party because notice was given to him of the investment, to which he made no reply(*t*). Therefore, where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it seems advisable for the parties to enter into some arrangement for the investment of the deposit.

As a vendor will not be subject to any loss by the

(*p*) *Duke of Norfolk v. Worthy*,
1 Camp. N. P. 337.

(*q*) *Pordage v. Cole*, 1 Saund.
319; see *Main v. Melbourn*, 4
Ves. jun. 720; *Klinitz v. Surry*,
5 Esp. Ca. 267; *Ambrose v. Am-*
brose, 1 Cox, 194.

(*r*) *Vinnius*, l. 3. 24.

(*s*) *Poole v. Rudd*, 3 Bro. C. C.
49; and see *Doyley v. the Coun-*
tes of Powis, 2 Bro. C. C. 32;
1 Cox, 206.

(*t*) *Roberts v. Massey*, 13 Ves.
jun. 561.

It is well settled, that assignees of a bankrupt are not bound to take what Lord Kenyon calls a *damnosa hæreditas*, property of the bankrupt, which so far from being valuable, would be a charge to the creditors; but they may make their election; if, however, they do elect to take the property, they cannot afterwards renounce it, because it turns out to be a bad bargain (*a*). This observation is made as an introduction to a late case (*b*), in which it was decided that the assignees of a bankrupt could not be charged as assignees of the lease, where they had not entered into actual possession, but merely put up the property to sale by auction without stating to whom it belonged, or on whose behalf it was sold, and no person bid at the sale: the Court considered this as a mere experiment to enable the assignees to judge, whether the lease were beneficial or not, and compared it to a valuation by a surveyor. If the assignees do accept the property, the bankrupt is by a late act (*c*) relieved from the rent and covenants, and if the assignees decline the same, the bankrupt is not to be liable in case he deliver up the lease to the lessor within fourteen days, and the lessor is enabled in a summary way to compel the assignees to make their election either to accept the same or deliver up the lease and possession of the estate.

Immediately after sale of an estate by auction, an agreement (*d*) to complete the purchase should be signed by the parties or their agent, because sales by auction of estates are within the statute of frauds (*e*); and consequently, the contract could not be enforced against either of the parties

(*a*) See 7 East, 342.

(*b*) *Turner v. Richardson*, 7 East, 336; *Wheeler v. Bramah*, 8 Campb. 370; *Copeland v. Stephens*, 1 Barn. & Ald. 593.

(*c*) 6 Geo. IV. c. 16, s. 75. See

ex parte Pomeroy, 1 Rose, 57; *ex parte* Nixon, 1 Rose, 445.

(*d*) See a form of an agreement, Appendix, No. 5.

(*e*) See *post*, ch. 3.

purchaser with whom the owner agrees for the sale of the property, at the sum stipulated, and a deposit is paid, the first agreement will be performed, although the purchaser cannot perform the agreement, if the seller let him off, and retain the deposit as a forfeiture (*i*).

V. By a late Act (*k*), the following duties are imposed upon every valuation or appraisement of any estate, or effects, real or personal, or of any interest therein, or of the annual value thereof; viz. where the amount does not exceed 50*l.* a duty of 2*s.* 6*d.*; where it exceeds 50*l.* but does not exceed 100*l.* a duty of 5*s.*; where it exceeds 100*l.* and does not exceed 200*l.* a duty of 10*s.*; where it exceeds 200*l.* and does not exceed 500*l.* a duty of 15*s.*; and where it exceeds 500*l.* a duty of 20*s.*

(*i*) *Horford v. Wilson*, 1 Taunt. 12.

(*k*) 55 Geo. III. c. 184. See *Lees v. Burrows*, 12 East, 1.

Master must be obtained to authorize the insertion of the advertisements in the Gazette. There are always two advertisements(c); in the first, no time is appointed for the sale. About three weeks or a month after the insertion of the first advertisement, a warrant must be taken out to fix a time for the sale, and it must be served on all the parties' clerks in court. The warrant being attended, the Master, with the approbation of all parties, will fix the time; and the second advertisement, which is usually called the peremptory advertisement, stating the time, must then be prepared, and inserted in the Gazette(d). The estate may be sold either before the Master; or, if from the situation and nature of the estate, the sale ought not to take place in town, it may be sold in the country before the Master's clerk, or any other person authorized by the Master(e).

The plaintiff's solicitor should attend at the sale, which is conducted in the following manner: The Master's clerk prepares a particular of the lots to be sold, with spaces between each lot. The lots are successively put up at a price offered by any person present, and every bidder must sign his name and the sum he offers, in the space on the particular, under the lot for which he bids; and formerly 2*s.* 6*d.* was paid to the Master's clerk for every bidding; but that regulation, which had a tendency to damp the sale, has lately been very properly abolished, and in lieu of the half-crowns, a sum is allowed to the clerk, as part of the expenses attending the sale. The best bidder is of course declared the purchaser. If any lots are not sold, they must be again advertised for sale(f).

The payment of a deposit, and the investment of it in

(c) 2 Fowl. Prac. 305.

(e) See 2 Fowl. Prac. 305.

(d) See 1 Turner's Practice by Ven. 127.

(f) See 1 Turn. Prac. 129; 2 Fowl. Prac. 306, 307.

is imposed upon, it would be a strong measure to *imply* notice of the fraud to the purchaser, from the very proceedings before the Court. But it is a settled maxim that persons purchasing under decrees of the Court are bound to see that the sale is made according to the decree (*o*).

A person having a legal lien, as a judgment-creditor not coming in under the decree, would not be bound by it, and might proceed against the purchaser, unless he obtained a legal interest over-reaching the lien; in which case the claim being merely in equity, the Court would protect the purchaser buying under its decree (*p*), or rather would not lend its aid to the judgment-creditor against him.

In sales by auction or private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales before a Master; the purchaser is not considered as entitled to the benefit of his contract till the Master's report of the purchaser's bidding is absolutely confirmed; and I shall now proceed to show what steps a purchaser must take to obtain an absolute confirmation of the Master's report.

The purchaser must first, at his own expense, procure a report from the Master, of his being the best bidder for the lot he has purchased. After the report is filed, and an office-copy of it taken by the purchaser, he must, at his own expense, apply to the Court by motion, of which no notice need be given (*q*), that the purchase may be confirmed. Upon this application the order will be confirmed *nisi* (*r*), that is, unless cause be shown against the same in eight days after service. The purchaser must, at

(*o*) Colclough v. Sterum, 3 Bligh, 181.

(*q*) See Parker's Analysis, 141.

(*r*) For a form of the order, see

(*p*) Barrett v. Blake, 2 Ball & Beat. 354.

2 Fowler's Pract. 308.

and if he can, to obtain an order upon the purchaser to complete his purchase (*d*) ; (I) but if the purchaser is unable to complete his purchase, then on the report being confirmed, it is moved to discharge him from the bidding (*e*), and notice of this motion must be given to the purchaser (*f*). But a purchaser will not be permitted to baffle the Court ; and therefore, instead of discharging the purchaser from his bidding, the Court will, if required, make an order that he shall, within a given time, pay the money, or stand committed (*g*).

When the report is absolutely confirmed, the purchaser is entitled to a conveyance on payment of the purchase-money, and may, after giving notice of his intention (*h*), apply to the Court for leave to pay his purchase-money into the Bank (*i*), and to be let into possession of the estate ; but this application should of course not be made until the title be approved of (*k*). When the money is paid according to the order, the purchaser must, at his own expense, obtain a certificate of the payment of it.

If the estate be subject to an incumbrance, which

(*d*) See 2 Fowl. Pract. 318, 325.

(*e*) *Cunningham v. Williams*, 2 Anstr. 344.

(*f*) For a form of the notice, see 2 Turn. Pract. 651.

(*g*) *Lansdown v. Elderton*, 14 Ves. jun. 512.

(*h*) For forms of the notice, see 2 Turn. Pr. 647 ; Park. Anal. 140.

(*i*) For the mode of paying the money into the Bank, see 1 Turn. Pract. 210 ; and for a form of the order, see 2 Fowl. Pract. 313.

(*k*) See 2 Fowl. Pract. 317.

(I) A motion was made before Lord Erskine, that the purchase-money should be paid in by the purchaser. The purchaser did not appear. After consulting the Register, who had searched for precedents, and expressing his unwillingness to do any thing to prejudice sales by the Court, the Chancellor refused the motion, but ordered the title to be referred to the Master ; and then, he said, if a good title could be made he would compel payment of the money according to the usual practice, Anon. Ch. 22d July, 1806, MS.

purchase, and had his money ready lying dead in a banker's hands ; for he might have moved to pay the money into Court, when it would have been laid out: and this, if done by special application, would not have been an acceptance of the title (*r*).

If a purchaser enter into possession, he will be compelled to pay the money into Court, although he entered with the permission of the parties in the cause. The Court only can give such permission (*s*).

When the report is absolutely confirmed, and every thing arranged, the draft of the conveyance must be drawn by the purchaser's solicitor, and either settled by the Master, if the parties insist upon it, or, which is more customary, by a conveyancing counsel of whom the Master approves. Sufficient time must be allowed for copies to be made for such parties in the cause as require them, and then warrants must be taken out to proceed on the draft. The Master's clerk will, at the purchaser's expense, ingross the deed, procure the report or certificate of its being allowed, and then deliver the deeds to the purchasers ; and it is usual to obtain the Master's signature to every skin. The report must be filed, and an office-copy of it taken (*t*).

It is usual, however, to so word decrees, that the draft shall not go before the Master *unless the parties differ*. Where this mode is adopted, the business is transacted in the same way as upon a sale by private contract, unless the parties cannot agree, in which case, resort is had to the Master.

When the deeds have been properly executed by all necessary parties, an affidavit of the due execution of them must be made, and filed in the affidavit office, and an office-

(*r*) *Barker v. Harper*, Coop. 32.

(*s*) *Anon. L. I. Hall*, 16 July 1816, MS.

(*t*) 1 *Turn. Pract.* 145.

by private contract, or in any other manner contrary to the order of the Court, and not actually conveyed to the purchaser, the Court will not take notice of the sale, but will direct the estate to be sold before the Master, according to the decree (c). And a person who has notice of the decree cannot be advised to purchase the estate unless it be sold before the Master (d): and the money should be paid into court and not to the party (e).

If an estate be sold contrary to the order of the Court, and the purchaser had notice of the decree, he will have no remedy; but if he bought without notice, he may recover at law for breach of the agreement (f).

A sale before a Master is not within the statute of frauds, and after confirmation of the Master's report of the best purchaser, the sale will be carried into effect even against the representative of the purchaser, although he did not subscribe; the judgment of the Court taking it out of the statute (g).

And even if the authority of an agent not being admitted cannot be proved, yet if the Master's report could be confirmed, the sale would be carried into execution unless some fraud were proved (h).

As a purchaser under a decree does by the act of purchase submit himself to the jurisdiction of the Court, he may, if he obtain possession of the estate before the contract is completed, be restrained by injunction from committing waste (i).

(c) *Annesley v. Ashurst*, 3 66: See *Mortlock v. Buller*, 10 P. Wms. 282. See and consider *ex* Ves. jun. 314.
parte Hughes, 6 Ves. jun. 617.

(d) See 2 vol. Ca. and Opin. 218.
224, 225.

(e) See 2 Scho. & Lef. 581.

(f) *Raymond v. Webb, Lofft*, & Stu. 381.

(g) *Att. Gen. v. Day*, 1 Ves.

(h) *Ibid.*

(i) *Casamajor v. Strode*, 1 Sim.

his deposit, and pay the costs of the first purchaser (*n*), and interest at the rate of 4*l.* per cent on such part of the purchase-money as the Master shall find to have lain dead (*o*).

Mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings, and they will be opened more than once, even on the application of the same person, if a sufficient advance be offered (*p*); but the Court will stipulate for the price, and not permit the biddings to be opened upon a small advance (*q*); and, although an advance of 10 per cent used generally to be considered sufficient on a large sum, yet no such rule now prevails (*r*); but in the case of a sale under a creditor's suit, the Court permitted the biddings to be opened, upon an advance of 5 per cent on 10,000 *l.* (*s*). An advance of 350 *l.* upon 5,300 *l.* was refused, and it was said that the former cases only established that where an advance so large as 500 *l.* is offered the Court will act upon it, though it be less than 10 per cent (*t*). Biddings, it seems, will not be opened unless 40 *l.* at least be offered in advance (*u*); and the common rule does not apply to a colliery (*w*).

(*n*) 2 Fowl. Pract. 318; 1 Turner's Pract. 131.

(*o*) This was directed on opening the biddings for Gen. Birch's estate, MS.

(*p*) Scott v. Nisbitt, 3 Bro. C. C. 475; Hodges v. Jones, 2 Fowl. Pract. 318; see Baillie v. Chaigneau, 6 Bro. P. C. by Toml. 313; Preston v. Barker, 15 Ves. jun. 140.

(*q*) Anon. 1 Ves. jun. 453; Anon. 2 Ves. jun. 487; Upton v. Lord Ferrers, 4 Ves. jun. 700; and Anon. 5 Ves. jun. 148.

(*r*) Andrews v. Emerson, 7 Ves. jun. 4; White v. Wilson, 14 Ves. jun. 151. See Anon. 3 Madd. 494.

(*s*) Brooks v. Snaith, 3 Ves. & Bea. 144.

(*t*) Garstone v. Edwards, 1 Sim. & Stu. 20. Lefroy v. Lefroy, 2 Russ. 606.

(*u*) Farlow v. Weildon, 4 Madd. 460; Brookfield v. Bradley, 1 Sim. & Stu. 23.

(*w*) Williams v. Attenborough, 1 Turn. 70.

Strong as the circumstances in this case were, Lord Eldon, in a late case, expressed great disapprobation of the decision, and determined generally, that after a purchaser has confirmed his report, unless some particular principle arises out of his character, as connected with the ownership of the estate, or some trust or confidence, or his own conduct in obtaining his report, the bidding ought not to be opened (*a*).

And Lord Redesdale, also, in a case before him, held that biddings could not be opened after the report was absolutely confirmed, unless on the ground of fraud on the part of the purchaser. And he considered it to the advantage of suitors to observe greater strictness in opening biddings, as it would procure better sales (*b*).

In a still later case, Lord Eldon adhered to the same rule, and said that he could not do a thing more mischievous to the suitors than to relax further the binding nature of contracts in the Master's office: half the estates that are sold in the Court being thrown away upon the speculation that there will be an opportunity of purchasing them afterwards by opening the biddings (*c*).

Fraud will, of course, be a sufficient ground for opening the biddings. Therefore, if the parties agree not to bid against each other (*d*), or a survey be made of an estate with some degree of collusion with the tenants (*e*), and it misrepresents the value and quality of the estate, and some of the purchasers are aware of this fraud in making the survey, and the owner is ignorant of it; or the purchaser of the estate be partner with the solicitor of the cause, and is in possession of some particular knowledge

(*a*) *Morice v. the Bishop of Durham*, 11 Ves. jun. 57.

(*b*) *Fergus v. Gore*, 1 Schoales & Lefroy, 350.

(*c*) *White v. Wilson*, 14 Ves. jun. 151.

(*d*) See 2 Ves. jun. 52.

(*e*) *Ryder v. Gower*, 6 Bro. P. C. 148; and see 2 Ves. jun. 53.

A man opening the biddings on behalf of a person not in existence, will himself be decreed to be the purchaser (*n*).

Where a person is permitted to open the biddings upon the usual terms, paying the costs, and making a deposit, and the estate is bought by another person, the person opening the biddings is entitled to take back his deposit; but he is not entitled to an allowance for his costs, as they are in the nature of a premium paid by him for the opportunity of bidding (*o*).

Under special circumstances, however, they might be allowed. If a person come forward for the benefit of the family, and the estate at the first sale was knocked down by mistake, or sold at a great under-value, he will be allowed his expenses (*p*).

It seems, that if a person purchase several lots of an estate, and the biddings are opened as to one, he shall have an option to open them all (*q*).

In two late cases the distinction was taken that where the lots, the biddings for which are sought to be opened, were purchased before the other lots bought by the same purchaser, he is entitled to have the biddings opened as to *all* the lots (*r*).

If a purchase be rescinded, and the purchaser has paid his money into court, and it has been laid out

(*n*) *Molesworth v. Opie*, 1 Dick. 289.

(*o*) *Rigby v. M'Namara*, 6 Ves. jun. 466; *Earl of Macclesfield v. Blake*, 8 Ves. jun. 214; *Trefusis v. Clinton*, 1 Ves. & Beam. 361.

(*p*) *Earl of Macclesfield v.*

Blake, *ubi sup.*; *Owen v. Fouls*, 9 Ves. jun. 348; *West v. Vincent*, 12 Ves. jun. 6.

(*q*) See 2 Anstr. 657; *ex parte Tilsley*, 4 Madd. 227. n.

(*r*) *Price v. Price*, 1 Sim. & Stu. 386.

the sale, who stated, that the rent payable for the house was the 50*l.* and the broker valued the estate accordingly. A written agreement was not entered into, but the contract was approved of by the Master, and the money paid into the Bank. The purchasers then moved the Court to rescind the contract, on the ground of mistake, and the broker proved that the purchasers had not informed him of the rent of 210*l.*; and that he was ignorant of the existence of it at the time he made his valuation: and the Court ordered the purchase-money to be repaid, and rescinded the contract. This, however, may be considered a strong case. It might be argued that the purchasers only equity was their own negligence.

Although the solicitor in the cause buy-in an estate merely to prevent a sale at an undervalue, yet if he act without authority he will not be discharged from his purchase. Lord Eldon has said, that it would be a very wholesome rule to lay down, that the solicitor in the cause should have nothing to do with the sale; as the certain effect of a bidding by the solicitor in the cause is that the sale is immediately chilled (*x*).

The same rule has been applied to assignees of a bankrupt, who, without authority, bought-in an estate ordered to be sold by the Court upon a petition of a mortgagee (*y*).

It may be observed, in this place, that if a bankrupt's estate be sold, and the purchaser pay a deposit, and then the commission is superseded, the Lord Chancellor will, upon petition, order the deposit to be returned, without driving the purchaser to file a bill (*z*).

Where a person bought under the decree for another who died without having adopted the contract, although

(*x*) *Nelthorpe v. Pennyman*, 14 Aug. 1816, MS. App. No. 11.
Ves. jun. 517.

(*z*) *Ex parte Fector*, 1 Buck, 428.
(*y*) *Ex parte Tomkins*, Ch. 23d

CHAPTER III.

OF PAROL AGREEMENTS AND PAROL EVIDENCE.

WITH a view to prevent many fraudulent practices which were commonly endeavoured to be upheld by perjury, it was enacted by the 29 Car. II. c. 3, usually called the statute of frauds, that (*a*) “all leases, estates, interests of freeholds, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements or hereditaments, made and created by livery and seisin only, or by parol, and not put in writing by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the effect of leases or estates at will, any consideration for making any such parol leases or estates notwithstanding.” But, nevertheless, leases not exceeding three years, whereupon the reserved rent should amount to two thirds of the full improved value, were excepted (*b*). The Act then requires the assignment, grant, and surrender of existing interests to be made by writing (*c*); and then (*d*) enacts that “no action shall be brought, whereby to charge any person upon any agreement made upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them (I), unless the agreement, upon which such

(*a*) Sect. 1.(*b*) Sect. 2.(*c*) Sect. 3.(*d*) Sect. 4.

(I) “Or upon any agreement not to be performed within a year;” which clause does not extend to any agreement concerning lands. *Hollis v. Edwards*, 1 Vern. 159. It is quite clear, that an agreement for sale of lands must be in writing, although the contract is to be performed the next day. See *Bracebridge v. Heald*, 1 Barn. and Ald. 722.

decide upon the precise construction of the first section, which seems in this respect to be co-extensive with the fourth, and, consequently, every interest which is within the fourth section is equally within the first, unless it come within the saving of the second section. The first and second sections appear to enact, that all interests actually created without writing shall be void, unless in the case of a lease not exceeding three years, at nearly rack-rent, which exception must have been introduced for the convenience of mankind, and under an impression that such an interest would not be a sufficient temptation to induce men to commit perjury. Perhaps, therefore, the first section ought to extend to every possible interest which is not within the exception in the second clause. If an estate, of whatever value, should be conveyed to a purchaser by livery of seisin, without writing, the act would avoid the estate, although the purchaser had paid his money. An actual lease for any given number of years, whether with or without rent, or any interest uncertain in point of duration, must, it should seem, equally fall within the provision of the first section, and cannot be sustained unless it come within the saving in the second section.

This, however, of itself would not have prevented all the evils which the act intended to avoid; for although actual estates could not be created, yet still parol *agreements* might have been entered into respecting the future creation of them. To remedy this mischief, the provision in the fourth section was inserted, which, it is conceived, relates not to contracts or sales of lands, &c. but to any *agreement* made upon any contract or sale of lands, &c. (I), and as agreements were more to be

(I) This appears to be the true reading of the statute, although this branch of the fourth section has been sometimes read as a distinct clause, in which case the word *agreement* is dropped, and the clause

follows the first section, and consequently an *agreement* by parol, to create even such an interest as is excepted in the second section, would be merely void.

If this be the true construction of the Act it answers the purposes for which it was passed, and the question in all cases must be—Is the interest in dispute actually created by the parties, or does the contract rest *in fieri*? If it be actually created, it is avoided by the first section, unless saved by the second. If it be not actually created, the agreement cannot be enforced by reason of the fourth section, whatever be the nature of it. But if the first section were to be restrained beyond the express provisions of the second section, then, although every parol *agreement* for any interest in lands would be void, yet many estates might still be actually raised by parol. The first section, however, seems to embrace *interests* of *every* description, whilst the exception relates only to *leases* of a *particular* description. One consequence of qualifying all the interests specified in the first section, in the manner proposed by the aid derived from the second section, would be, that an estate in fee might still, as formerly, be conveyed by livery of seisin without writing. But if the doctrine should even be confined to *leases*, yet it would open a considerable door to perjury. If the two requisites are to concur to bring a lease within the first section, namely, a larger interest than that mentioned in the second section, and a reserved rent, then it should seem that a lease by parol for a thousand years without rent would be valid, notwithstanding the statute. If even one only of these requisites be essential, yet cases of importance may be taken out of the Act; an estate, however valuable, may be claimed under a parol lease for any term short of three years without rent. This is the temptation to perjury which the statute intended to remove. And

of that part of the close upon which he was to have the liberty of stacking coals (I). Lee, C. J. and Dennison, held the agreement to be good. They relied upon the case of Webb and Paternoster (*i*), where they said it is laid down, that a grant of a license to stack hay upon land, does not amount to a lease of the land. As the agreement in the present case was only for an easement, and not for an interest in the land, it did not amount to a lease, and consequently it was not within the statute of frauds. Mr. Justice Forster concurred in opinion, that the agreement did not amount to a lease, but he inclined to be of opinion, that the words in the statute, any *uncertain interest in land*, did extend to this agreement; but Lee and Dennison thought those words related only to interests, which were uncertain as to the time of their duration. After time taken to consider, it was holden, that the agreement was good for the seven years.

The case referred to in Palmer does not seem to bear out the judgment in the above case: the decision turned upon another point; but Montague and Haughton both thought, that the interest in that case was such as bound the land in the hands of a subsequent lessee. That case arose before the statute of frauds, and it would require a considerable stretch to make it apply to a case since the statute. No one will deny, that these cases are within the mischief against which the Legislature intended to guard. In Wood and Lake, the plaintiff was to have the sole use of the part of the land upon which he should stack his coals. How is this to be distinguished in substance from an actual demise for seven years? It appears to be in the very teeth of the statute, which extends generally to all leases,

(*i*) Palm. 71.

(I) Sayer is but an inaccurate reporter. It is not stated, but the fact is, that an annual payment was reserved in respect of the easement.

tel; and to this opinion Mr. Justice Powell agreed. This decision, however, may be thought to be overruled by the late case of *Crosby v. Wadsworth* (*m*), where a sale of a standing crop of mowing grass then growing was held to be within the statute.

The distinction between them appears to be, that in this case, the exclusive right to the vesture of the land was conferred during a limited period, whilst, in the former case, a mere right of entry to cut and carry away the trees would have been held to pass. Indeed, it does not appear by whom the trees were to be felled and carried away.

In a recent case, however, the Court expressed its disinclination to extend the case of *Crosby v. Wadsworth*, which one learned Judge referred to the circumstance, that the grass was growing, and therefore the purchaser had an intermediate interest in the land while the crops were growing to maturity, before they were gathered. Therefore a sale of potatoes in the ground, and which had never been severed, at so much a sack, to be taken away *immediately*, was held not to be within the statute; because the contract was confined to the sale of potatoes, and nothing else was in the contemplation of the parties. They were to be taken *immediately*, and it was quite accidental if they derived any further advantage from being in the land. The purchaser had only an accommodation, and no interest in the soil. The land was considered as a mere warehouse for the potatoes (*n*).

In a case decided in the same term in the Common Pleas, where growing turnips were sold, but no particular time was stated for their removal, nor did it appear what

(*m*) 6 East, 602, *et supra*; *per* Mansfield, C. J.
Waddington v. Bristow, 2 Bos. (n) *Parker v. Staniland*, 11
& Pull. 452; and see 2 Taunt. 41, East, 362.

worth, without overruling that case, renders it difficult to apply the law to individual cases.

If an entire agreement be made for the sale of real and personal estate, and the agreement as to the land be within the statute, and void, it cannot be supported as to the personal property which was sold with it (*r*).

SECTION II.

Of the Form and Signature of the Agreement.

WE may now consider, first, what is a sufficient agreement; 2dly, what is a sufficient signature by the party or his agent; and 3dly, who will be deemed an agent lawfully authorized. And,

First then, it is to be observed, that the statute requires the writing to be signed only by the person to be charged; and therefore, if a bill be brought against a person who signed an agreement, he will be bound by it although the other party did not sign it, as the agreement is signed by the person to be charged (*s*). This point has

(*r*) *Cooke v. Tombs*, 2 Anst. 420; *Lea v. Barber*, *ib.* 425, cited. See *Chater v. Beckett*, 8 Term Rep. 201; and see *Neal v. Viney*, 1 Camp. Ca. 471; *Corder v. Drakeford*, 3 Taunt. 382; *Mayfield v. Wadsley*, 3 Barn. & Cress. 357.

(*s*) *Hatton v. Gray*, 2 Ch. Ca. 164; *Cotton v. Lee*, 2 Bro. C. C. 564; *Coleman v. Upcot*, 5 Vin. Abr. 527. pl. 17; *Buckhouse v. Crossby*, 2 Eq. Ca. Abr. 32, pl. 44; *Seton v. Slade*, 7 Ves. jun. 265; *Fowle v. Freeman*, MS.; 9 Ves. jun. 355, S. C. See 1 Scho. &

Lef. 20; and 11 Ves. jun. 592; *Western v. Russell*, 3 Ves. & Bea. 187; and see *Wain v. Warlters*, 5 East, 10; *Egerton v. Matthews*, 6 East, 307, which do not impeach this doctrine: see particularly 5 East, 16; and *Allen v. Bennet*, 3 Taunt. 169. As to *Wain v. Warlters*, see *Stadt v. Lill*, 9 East, 348; 1 Camp. Ca. 242; *Ex parte Minet*, 14 Ves. jun. 189; *Ex parte Gardom*, 15 Ves. jun. 286; *Bateman v. Philips*, 15 East, 272; *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Jenkins v. Reynolds*, 3 Brod. & Bing. 14.

has not upon these points gone farther than courts of law : what is the construction of the statute, what within the legal intent of it will amount to a signing, being the same questions in equity as at law. Upon that point, equity professing to follow the law, if a new question should arise, his Lordship said, that he would rather send a case to a court of law (z). In a still later case at *nisi prius*, where the purchaser only had signed, Lord Tenterden said that it was the duty of the auctioneer to sign, and he had often had occasion to lament they do not do so. What a court of equity would do in the case he could not possibly say. He declined deciding the point according to his opinion, as the counsel would not undertake to carry the same forward on a bill of exceptions (a).

But although the agreement must be signed, yet it need not be so averred in a bill for a specific performance ; for the writing, unless signed, would not be an agreement, and as the allegation in the bill of course is that there is an agreement in writing, signature must be presumed until the contrary is shown (b).

If a written agreement has been in a part executed, it seems that an agreement subsequently entered into between the parties, and reduced into writing, will bind them both, if signed by one of them (c).

A receipt for the purchase-money may constitute an agreement in writing within the statute (d) ; and it has frequently been decided, that a note or letter will be a sufficient agreement to take a case out of the statute (e) ; but every agreement must be stamped before it can be

(z) 18 Ves. jun. 183.

(a) *Wheeler v. Collier*, 1 Mood. & Mal. 123.

(b) *Rist v. Hobson*, 1 Sim. & Stu. 543.

(c) *Owen v. Davies*, 1 Ves. 82.

(d) *Coles v. Trecothick*, 9 Ves. jun. 234 ; *Blagden v. Bradbear*, 12 Ves. jun. 466.

(e) *Coleman v. Upcot*, 5 Vin. Abr. 527, pl. 17 ; *Buckhouse v. Crossby*, 2 Eq. Ca. Abr. 32, pl. 44.

But if it appear that, on being submitted to any person for acceptance, he had hastily snatched it up, had refused the owner a copy of it; or if, from other circumstances, fraud in procuring it may be inferred, it seems that in case of an action it will be left to the jury to say whether it was intended by the defendant, at first, to be a valid agreement on his part, or as only containing proposals in writing, subject to future revision (*l*): and if the aid of equity be sought, these circumstances would have equal weight with the Court. So in every case it must be considered, whether the note or correspondence import a concluded agreement: if it amount merely to treaty, it will not sustain an action or suit (*m*).

The letters will not constitute an agreement unless the answer to the offer is a simple acceptance, without the introduction of any new term (*n*).

And although a given time be named in the offer for the acceptance of it, yet it may be retracted at any time before it is actually accepted (*o*).

And where a letter or other writing do not in itself evidence all the terms of the engagement by which the person signing it consents to be bound, but it require from the other party not a simple assent to the terms stated, but a special acceptance which is to supply a farther term of the agreement; there it is obvious that such special acceptance must be expressed in writing, for otherwise the whole agreement will not be in writing within the statute of frauds (*p*).

The note or writing must specify the terms of the

(*l*) See *Knight v. Crockford*, & *Stu.* 194; *Routledge v. Grant*, 1 *Esp. Ca.* 189. 4 *Bing.* 653; 1 *Moore & Payne*,

(*m*) *Huddleston v. Briscoe*, 11 717.

Ves. jun. 583; *Stratford v. Bosworth*, 2 *Ves. & Bea.* 341; *Ogilvie v. Foljambe*, 3 *Mer.* 53.

(*o*) *Routledge v. Grant*, *ubi sup.*

(*p*) *Boys v. Ayerst*, 6 *Madd.*

(*n*) *Holland v. Eyre*, 2 *Sim.* 316.

sufficient evidence of the agreement, the terms of it not being mentioned in the agreement itself.

So in a recent case, where an auctioneer's receipt for the deposit was attempted to be set up as an agreement, the Master of the Rolls rejected it, because it did not state the price to be paid for the estate ; and it could not be collected from the amount of the deposit, as it did not appear what proportion it bore to the price (*t*).

And here we may notice a case where an agreement was executed which referred to certain covenants, which had been read, contained in a described paper, which, in fact, contained the terms of the agreement. It appeared that all the covenants contained in that paper had not been read ; and which of them had been read, and which had not, was the difficulty, which could only be solved by parol testimony ; and Mr. Justice Buller held clearly, that such evidence was inadmissible (*u*), as it would introduce all the mischiefs, inconvenience, and uncertainty the statute was designed to prevent ; and Lord Redesdale has since unqualifiedly approved of this decision (*w*).

Neither will a performance be compelled on a note or letter, if any error or omission, however trifling, appear in the essential terms of the agreement.

Thus in a case (*x*) (I) before Lord Hardwicke, the

(*t*) *Blagden v. Bradbear*, 12 Ves. jun. 466 ; see *Elmore v. Kingscote*, 5 Barn. & Cress. 583. see *O'Herlihy v. Hedges*, *ibid.* 123.

(*u*) *Brodie v. St. Paul*, 1 Ves. jun. 326 ; *Higginson v. Clowes*, 15 Ves. jun. 516 ; *Lindsay v. Lynch*, 3 Sch. & Lef. 1.

(*w*) 1 Scho. & Lef. 38 ; and

(*x*) *Lord Middleton v. Wilson* ; *et e contra*, Chan. 1741, MS. ; S. C. Lofft, 801, cited. See 9 Ves. jun. 252 ; *Stokes v. Moore*, 1 Cox, 219 ; *Popham v. Eyre*, Lofft, 786 ; *Gordon v. Trevalyan*, 1 Price, 64 ; *Blore v. Sutton*, 3 Mer. 237.

(I) The case is in Reg. Lib. 1741, fo. 260, by the name of *Lord Middleton v. Eyre*. The estate was sold by an agent to Dr. Wilson, by parol, and the parties appear to have bound themselves by letters, the particulars of which, however, do not appear in the Register's book.

tity of the advertisement might be proved by parol evidence (z). And the Master of the Rolls, in a late case, expressed his opinion, that a receipt which did not contain the terms of the agreement, might have been enforced as an agreement, had it referred to the conditions of sale, which would have entitled the Court to look at them for the terms (a).

So an agreement not containing the name of the buyer may be made out by connecting it with a letter from the buyer on the subject (b).

In a case (c) where an agreement for sale was reduced into writing, but not signed, owing to the vendor having failed in an appointment for that purpose; the vendee's agent wrote to urge the signing of the agreement; and the vendor wrote in answer a letter, in which, after stating his having been from home, he said, "his word should always be as good as any security he could give." And this was held by Lord Thurlow to take the case out of the statute, as clearly referring to the written instrument. The ground of this decision was, that the vendor had agreed, by writing, to sign the agreement. If he had said he never would sign it, he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to perform it; if he said he would never sign it, because

(z) See *Clinan v. Cooke*, 1 Scho. & Lef. 22; and see *Cass v. Waterhouse*, Prec. Cha. 29; *Hinde v. Whitehouse*, 7 East, 558; *Feoffees of Herriot's Hospital v. Gibson*, 2 Dow, 301; *Powell v. Dillon*, 2 Ball & Beat. 416.

(a) *Blagden v. Bradbear*, 12 Ves. jun. 466; and see *Shippey v. Derison*, 5 Esp. Ca. 190; *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield*, 3 Barn. &

Cress. 945; *Verlander v. Codd*, 1 Turn. & Russ. 352.

(b) *Allen v. Bennet*, 3 Taunt. 169; *Western v. Russell*, 3 Ves. & Bea. 187.

(c) *Tawney v. Crowther*, 3 Bro. C. C. 161, 318; and see *Forster v. Hale*, 3 Ves. jun. 696; *Cooke v. Tombs*, 2 Anstr. 420; *Saunderson v. Jackson*, 2 Bos. & Pull. 238; and 9 Ves. jun. 250.

containing the particulars of the agreement; nor will letters written, or representations made by him, to creditors, concerning the sale, receive that construction.

Thus, in a case (*p*) where *A.* agreed by parol with *B.* for the purchase of lands; shortly afterwards, a rent-roll was delivered to *A.*, which *B.* dated and altered in his own hand-writing; and it was intituled, "Land agreed to be sold by *B.* to *A.*, from, &c. at twenty-one years purchase, for the clear yearly rent." An abstract of the title, also, stating the contract, was delivered by *A.*'s agent, and also further particulars and papers at different times. *B.* also wrote to several of his creditors, informing them that he had agreed with *A.* for the sale of the estate, at twenty-one years purchase; referred tenants to *A.* as owner of the estate; and set up the contract as a bar to an *elegit*. *B.* afterwards refused to perform the agreement; and to a bill filed for a specific performance, pleaded the statute of frauds, and the plea was allowed.

So, in a later case (*q*), upon a bill filed by a vendee, for a specific performance of a parol agreement for sale of lands, it appeared that the vendor gave the purchaser a particular of the property to be sold, with the terms and conditions, all in his own hand-writing, and signed by him; and it was afterwards delivered, by agreement of both parties, to an attorney, to prepare the conveyance from, who prepared a draft, and brought it to the parties, and they read over and approved of it, and agreed to execute the same, whenever a fair copy could be written out. The defendant, however, refused to fulfil his part of the agreement, and pleaded the statute of frauds to the bill; and, as the particular was delivered at the outset of the treaty, no agreement being then made, the

(*p*) *Whaley v. Bagenel*, 6 Bro. 420; and see *Cass v. Waterhouse*, P. C. 45. Prec. Cha. 29.

(*q*) *Cook v. Tombs*, 2 Anst.

him, and was delivered by Mr. Everett to the solicitor in town. Freeman afterwards refused to perform the agreement; and, to a bill filed by Fowle for a specific performance, pleaded the statute of frauds. The Master of the Rolls held, that if the attorney had prepared an agreement, according to the letter, Freeman would have been compelled to execute it, and the attorney could not alter the agreement itself in any one respect. A letter or proposal will do, although the party repents; and many decrees have been founded merely on letters. If this objection were to hold, he said, it might be contended, that if an agreement contained a reference to title-deeds to be formally executed, it would not do; and his Honor decreed a specific performance.

In these cases it should be observed, that letters may be stated in a bill as constituting the alleged agreement, or as evidence of an alleged parol agreement. In the first case, the defendant may insist that they do not make out a concluded agreement, and no extrinsic evidence can be received; in the latter he may plead the statute of frauds (*t*).

II. We are next to consider what is a sufficient signature by the party or his agent. Before the statute of frauds, an agreement, although reduced into writing and signed, was not considered as a written agreement unless sealed; but it was regarded as a parol agreement, and the writing as evidence of it (*u*).

It has been justly said that the same rule prevails since the statute of frauds(*x*); for the law of England recognizes only two kinds of contracts; viz. specialties and parol agreements, which last include all writings not

(*t*) *Birce v. Bletchley*, 6 Madd. 17.

(*u*) See 1 Ch. Ca. 85.

(*x*) See *Marq. of Normanby v. Duke of Devonshire*, 2 Freem. 216.

agrees to sell, &c.” and this is only in analogy to the case of a testator writing his name at the beginning of his will, which is equivalent to his signing it; and yet the statute expressly requires a signature (*c*).

And such a signature will be sufficient, although a place be left for a signature at the bottom of the instrument (*d*). (*I*); and yet, as Lord Eldon has observed, it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete till it was further signed.

And if the party know the contents of the agreement, a subscription, as a witness, is a sufficient signing (*e*).

So, where a clerk of an agent duly authorized to treat for a principal, signed an agreement thus, “Witness *A. B.* for *C. D.* agent to the seller,” it was holden to be out of the statute (*f*). And it is sufficient, it seems, if the initials of the name are set down (*g*).

(*c*) *Knight v. Crockford*, 1 Esp. Ca. 189; and see 1 Bro. C. C. 410; 3 Esp. Ca. 182; 9 Ves. jun. 248; and *Saunderson v. Jackson*, 2 Bos. & Pull. 238. See *Cooper v. Smith* 15 East, 103; *Morison v. Turnour*, 18 Ves. jun. 175.

(*d*) *Saunderson v. Jackson*, *ubi sup.*

(*e*) *Welford v. Beazely*, 3 Atk. 503. See 9 Ves. jun. 251.

(*f*) *Coles v. Trecothick*, 9 Ves. jun. 234; 1 Smith’s Rep. 233; but see *Blore v. Sutton*, 3 Mer. 237.

(*g*) *Phillimore v. Barry*, 1 Camp. Ca. 513.

(*I*) This question frequently arises upon wills of personalty. *Walker v. Walker*, decided by the Court of Delegates, 19th Feb. 1805. Ann Walker made her will, comprising real and personal estate, which she signed and sealed, and then folded up with this indorsement; “I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons for it.” The usual attestation clause was added, but not signed by any witness. At her death the instrument was found in her drawer in the envelop, and it was determined not to be a good will of the personal property, on the ground, that something appearing by the attestation clause to be intended to be done, the instrument was not complete as the last will of the testatrix. 1 Mer. 503. See *Beaty v. Beaty*, 1 Addams, 154.

the agreement out of the statute ; although it was not necessary to decide the point.

Lord Eldon is reported to have said, that he had some doubt of the doctrine in this case (*n*).

Mr. Baron Eyre appears to have put it on its true grounds. He said, that the signature is to have the effect of giving authenticity to the whole instrument ; and if the name is inserted *so as to have that effect*, he did not think it signified much in what part of the instrument it was to be found : it was, perhaps, difficult, except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect ; and then the name being generally found in a particular place, by the common usage of mankind, it may very *probably* [qu. properly] have the effect of a legal signature, and extend to the whole ; but he did not understand how a name inserted in the body of an instrument, and *applicable to particular purposes*, could amount to such an authentication as is required by the statute.

III. In considering what signature satisfies the requisition of the statute, we have necessarily adverted to signatures by agents ; and it will now be proper to consider who will be deemed an agent lawfully authorized within the statute of frauds to sign an agreement for the sale or purchase of an estate.

In the first and third sections of the statute of frauds, which relate to leases, &c. the writing is required to be signed by the parties making it, or their agent *authorized by writing*. This latter requisite is omitted in the fourth

(*n*) And see *Emmerson v. Heelis*, 2 Taunt. 38, and observe how the purchaser's name was signed there. See also *Morison v. Tur-*

nour, 18 Ves. jun. 175 ; *Western v. Russell*, 3 Ves. & Bea. 187 ; *Ogilvie v. Foljambe*, 3 Mer. 53.

price, yet it seems that his clerk cannot contract without a special authority or agreement for that purpose (*s*); which, however, need not be in writing.

The principal may revoke the authority of the agent at any time before an agreement is executed according to the statute, although the agent has previously agreed *verbally* to sell the property (*t*); and an intended purchaser may in like manner revoke his authority to his agent to purchase (*u*).

The statute requires every agreement as to lands, or some memorandum or note thereof, to be in writing, and signed *by the party to be charged*, or some other person *thereunto*, (that is, to the signing thereof) (*x*) by *him* authorized. And that as to goods, some note or memorandum in writing of the bargain shall be made and signed by the *parties* to be charged by such contracts, or their *agents*, thereunto authorized. And yet it has been decided, that the signature of the party to be charged by himself or agent is sufficient, even in a contract for goods (*y*), although the other party has not signed, and consequently is not bound; so that there appears to be no difference between the two clauses of the statute, in regard to the appointment and power of an agent.

It has, however, been repeatedly decided, that an auctioneer is the agent of both parties upon a sale of goods, so as to be enabled to bind them both under the statute (*z*); whilst, on the contrary, it has been decided,

(*s*) *Coles v. Trecothick*, 9 Ves. jun. 234.

(*t*) See *Farmer v. Robinson*, 2 Campb. 339, n.

(*u*) As to sales by auction, see *Blagden v. Bradbear*, 12 Ves. jun. 467; *Mason v. Armitage*, 13 Ves. jun. 25.

(*x*) See 1 Ves. & Beam. 207.

(*y*) *Allen v. Bennet*, 3 Taunt. 169.

(*z*) *Simon v. Motivos*, 3 Burr. 1921; Bull. Ni. Pri. 280; 1 Blackst. 599; *Rucker v. Cammeyer*, 1 Esp. Ca. 105; *Hinde v. Whitehouse*, 7 East, 558; and see *Rondeau v. Wyatt*, 2 H. Blackst. 67; and 1 Ca. & Opin. 142, 143; *Phillimore*

is not the agent of the purchaser (*d*). The rule, therefore, may now be laid down generally, that an auctioneer is an agent lawfully authorized by the purchaser. It was always clear, that an auctioneer, appointed by a vendor, was a good agent for *him* within the statute (*e*).

And although a purchaser bid by an agent, yet the auctioneer is still duly authorized to sign the agreement (*f*).

The agent must be a third person: neither of the contracting parties can be the agent of the other (*g*); and therefore, although a purchaser is bound by the signature of the auctioneer, yet the auctioneer himself cannot maintain an action upon such a contract, because the agent whose signature is to bind the defendant must not be the other contracting party upon the record (*h*).

Finally, a contract by one as agent for another is valid under the statute although the alleged agent had no authority at the time, provided that the alleged principal afterwards ratifies the contract (*i*).

SECTION III.

Of Parol Agreements not within the Statute.

I. WE have seen what is considered a sufficient agreement to take a case out of the statute; but there are cases in which the performance of an agreement will be compelled, although the terms of it are not reduced to writing: for though the statute provided that no agreement

(*d*) *Kemys v. Proctor*, 3 Ves. & Bea. 57; 1 Jac. & Walk. 350; *Kenworthy v. Schofield*, 2 Barn. & Cress. 945. (*e*) *Vide supra*.

(*f*) *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209.

(*g*) See *Wright v. Dannah*, 2 Camp. 283.

(*h*) *Farebrother v. Simmons*, 5 Barn. & Ald. 333.

(*i*) *Maclean v. Dunn*, 4 Bingham 722.



a transaction of either fraud or perjury, a sale before a Master, under the decree of a court of equity, will be carried into execution, although the purchaser did not subscribe any agreement. The judgment of the Court, in confirming the purchase, takes it out of the statute (*p*).

So if, under a reference to a Master, an agreement be made to lay out trust-money in the purchase of particular lands, and the Master make his report accordingly, and the report be confirmed without any opposition by the owner of the estate, the purchase will be carried into a specific execution, although no agreement was signed by the vendor. The sale is a judicial sale, which takes it entirely out of the statute (*q*).

II. It has been repeatedly determined in equity (*r*), that if a bill be brought for the execution of an agreement not in writing, nor so stated in the bill, yet if the defendant put in his answer, and confess the agreement, that takes the case entirely out of the mischief intended to be prevented by the statute; and there being no danger of perjury, the Court would decree it; and if the defendant should die, upon a bill of revivor against his heir, the same decree would be made as if the ancestor were living, the principle going throughout, and equally binding the representatives (*s*).

Lord Chancellor Bathurst, however, held that an agreement, not in part performed, could not be carried into execution, although confessed by the answer. In *Eyre v. Popham* (*t*), addressing himself to Mr. Ambler, he asked

(*p*) *Attorney General v. Day*, 1 Ves. 218; and see 12 Ves. jun. 472. 437; *Gilb. Eq. Rep.* 35; *Wanby v. Sawbridge*, 1 Bro. C. C. 414, cited.

(*q*) S. C.

(*s*) *Per* Lord Hardwicke, see

(*r*) *Croyston v. Banes*, Prec.

1 Ves. 221.

Cha. 208; and see 1 Ves. 221, 441; *Ambl.* 586; *Mose.* 370; and *Symondson v. Tweed*, Prec. Cha.

(*t*) *Lofft*, 808, 809; and see *Eyre v. Iveson*, 2 Bro. C. C. 563, cited.

a specific performance of a parol agreement, his Lordship said, the plea was proper, but then the defendant ought, by answer, to deny the agreement; for if he confessed the agreement, the Court would decree a performance, *notwithstanding the statute*; for that such confession would not be looked upon as perjury, or intended to be prevented by the statute. And he therefore confirmed an order, that the plea should stand for an answer, with liberty for the plaintiff to except thereto, and that the benefit thereof should be saved to the defendant until the hearing of the cause. And Lord Hardwicke appears to have entertained the same opinion (*x*).

In *Whitchurch v. Bevis* (*y*), Lord Thurlow at first expressed his opinion, that the only effect of the statute was, that an agreement should not be proved *aliunde*. No evidence that could be given would sustain the suit if the defendant answered and denied the agreement. In this case the agreement was confessed, but the statute was pleaded, and it was ultimately decided on its own particular circumstances. Lord Thurlow said, he meant to determine upon the ground of this particular case; because it might become to be more seriously considered what sort of a verbal agreement, notwithstanding the plea of the statute of frauds, might be sustained, as being confessed by the answer, so as the Court would carry it into execution. His Lordship added, that he was prepared to say, if there were general instructions for an agreement, consisting of material circumstances to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party takes advantage of the *locus pœnitentiæ*, he should not be compelled to perform such

(*x*) See *Cottington v. Fletcher*, 2 Atk. 155; and see 3 Atk. 3; but see 4 Ves. jun. 24.

(*y*) 2 Bro. C. C. 559; 2 Dick. 664.

a bar to the relief, although the agreement be admitted (c). It is immaterial, he said, what admissions are made by a defendant insisting upon the benefit of the statute, for he throws it upon the plaintiff to show a complete written agreement; and it can no more be thrown upon the defendant to supply defects in the agreement, than to supply the want of an agreement.

Where, however, a defendant has, by answer, admitted the agreement, and submitted to perform it, he cannot, by an answer to an amended bill, plead the statute of frauds (d).

If the defendant deny the agreement, he may be tried for perjury; but a conviction will not enable equity to decree a performance of the agreement (e) (I); and therefore, as the plaintiff cannot avail himself in any civil proceedings of the conviction of the defendant, he is a competent witness to prove the perjury (f).

III. There are other cases taken out of the statute, not so much on the principle of no danger of perjury, as that the statute was not intended to create or protect fraud. Lord Keeper North appears to have entertained a floating opinion, although he does not seem to have ever actually decided the point, that if the plaintiff laid in his

(c) *Blagden v. Bradbear*, 12 Ves. jun. 464; see also 2 Ball & Beat. 349. 1 Cox, 15. See *Rastel v. Hutchinson*, 1 Dick. 44, and *Fell v. Chamberlain*, 2 Dick. 484; *Burdon v. Browning*, 2 Taunt. 520.

(d) *Spurrier v. Fitzgerald*, 6 Ves. jun. 548. (f) *The King v. Boston*, 4 East,

(e) *Bartlett v. Pickersgill*, 4 Burr. 2255; 4 East, 577, n. (b); 572.

(I) It appears that the plaintiff in *Fell v. Chamberlain* did prefer a bill of indictment for perjury against the defendant; and the Master of the Rolls granted an order to the six clerks to deliver the bill and answer, interrogatories, and depositions of witnesses to a solicitor, in order to be produced at the trial. Reg. Lib. A. 1772, fo. 496.

although attended with expense. Therefore, delivering an abstract, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, &c. (*l*), will not take a parol agreement out of the statute.

But if possession be delivered by the purchaser, the agreement will be considered as in part executed (*m*); especially if he expend money in building or improving according to the agreement (*n*), for the statute should never be so turned, construed, or used, as to protect or be a mean of fraud (*o*).

Possession, however, must be delivered in part-performance; for if the purchaser obtain it wrongfully, it

(*l*) Clerk v. Wright, 1 Atk. 12; Whitbread v. Brockhurst, 1 Bro. C. C. 412; Cole v. White, 1 Bro. C. C. 409, cited; Whitchurch v. Bevis, 2 Bro. C. C. 559; Whaley v. Bagenal, 6 Bro. P. C. 645; Cooke v. Tombs, 2 Anst. 420; and see Cooth v. Jackson, 6 Ves. jun. 12; and Redding v. Wilkes, 3 Bro. C. C. 400.

(*m*) Butcher v. Stapely, 1 Vern. 363; Pyke v. Williams, 2 Vern. 465; Lockey v. Lockey, Prec. Cha. 518; Earl of Aylesford's case, 2 Stra. 783; Binstead v. Coleman, Bunb. 65; S. C. MS. in *tot. verbis*; Barrett v. Gomeserra, Bunb. 94; Lacon v. Mertins, 3 Atk. 1; Wills v. Stradling, 3 Ves.

jun. 378; Bowers v. Cator, 4 Ves. jun. 91; Denton v. Stewart, 4th July 1786, cited in Mr. Fonbl. note to 1 Trea. Eq. 175 (I); Gregory v. Mighell, 18 Ves. jun. 328; Kine v. Balfe, 2 Ball & Beat. 343; Morphett v. Jones, Rolls, Feb. 1818, MS.; 1 Swanst. 172.

(*n*) Foxcraft v. Lister, 2 Vern. 456; Gilb. Eq. Rep. 4, cited; Colles P. C. 108, reported; Floyd v. Buckland, 2 Freem. 268; Mortimer v. Orchard, 2 Ves. jun. 243; Toole v. Medlicott, 1 Ball & Beatty, 393. See Wheeler v. D'Esterre, 2 Dow, 359; and see 19 Ves. jun. 479.

(*o*) See 3 Burr. 1919.

(I) In this case the plaintiff not only purchased the house, but also the furniture, for which she had actually paid; and it appears by the decree, that there was a receipt given by the defendant, the contents of which, however, are not stated in the Registrar's book. The defendant positively denied the agreement, and insisted that the plaintiff was only tenant at will. Reg. Lib. A. 1785, fo. 552, by the name of Denton v. Seward; *ibid.* 717, by the name of Denton v. Stewart.

was held to be within the statute. The act done was equivocal: for it would have taken place equally if there had been no agreement: it was such also as easily admitted of compensation, without executing the agreement. The money expended might be recovered from the landlord, if it was by the landlord that the expense was to be borne (*t*).

In a late case, Lord Redesdale thought that it was absolutely necessary for courts of equity, in these cases, to make a stand, and not carry the decisions farther (*u*).

It is generally understood, that payment of a substantial part of the purchase-money will take a parol agreement out of the statute. How far this opinion is well founded, appears to be deserving of particular consideration.

There are four cases in Tothill, which arose previously to the statute of frauds, and appear to be applicable to the point under consideration; for equity, even before the statute of frauds, would not execute a mere parol agreement not in part performed. In the first case (*x*), which was heard in the 38th of Eliz. relief was denied, "because it was but a preparation for an action upon the case." In the two next cases (*y*), which came on in the 9th of Jac. I., parol agreements were enforced, apparently on account of the payment of very trifling parts of the purchase-money, but the particular circumstances of these cases do not appear. The last case reported in Tothill (*z*), was decided in the 30th of Jac. I., and the facts are distinctly stated. The bill was to be relieved concerning a promise to assure land of inheritance, of which there

(*t*) *Frame v. Dawson*, 14 Ves. jun. 386. See *Lindsay v. Lynch*, 2 Scho. & Lef. 1; *O'Reilly v. Thompson*, 2 Cox, 271.

(*u*) See 2 Scho. & Lef. 5.

(*x*) *William v. Nevil*, Toth. 135.

(*y*) *Ferne v. Bullock*, Toth. 206.
Clark v. Hackwell, *ibid.* 228.

(*z*) *Miller v. Blandist*, Toth. 85.

tract, not in writing, shall be binding ; there is also a clause in the act, which relates to sales of goods, which are declared to be binding if something is given in earnest to bind the bargain.

The first case in the books, subsequently to the statute, is in *Freem.*(*d*), where it is stated, that a contract for land, and *a great part* of the money paid, is void since the statute of frauds and perjuries ; but the party that paid the money may, in equity (*I*), recover back the money. And for this Freeman states he saw Sir William Jones's opinion under his hand. This was about four years after the act. The next case is *Leak v. Morrice*(*e*), which occurred in the same year ; the bill was to have an agreement performed by the defendant ; which was, in effect, that the defendant should assign a term of years in his house and certain goods, for two hundred guineas, whereof he paid one in hand as earnest of the bargain, and three days after nineteen guineas more ; and part of the bargain was, that it should be executed by writings, by a certain time. The defendant pleaded the statute of frauds, and alleged the money was only paid for the lease, but confessed the receipt of the twenty guineas, and offered to repay them. Lord Keeper North said, it was clear that the defendant ought to repay the money, but overruled the plea on another ground. In this case it does not appear to have occurred to either the bar or the court, that payment of money would take a parol contract for lands out of the statute. The case of *Alsop v. Patten*(*f*), arose about fifteen years afterwards. There a joint lessee of a building lease agreed to sell his moiety to the other lessee for four guineas, and accepted a pair of compasses in hand to

(*d*) 1 *Freem.* 486. ca. 664 b.

(*f*) 1 *Vern.* 472.

(*e*) 2 *Ch. Ca.* 135 ; 1 *Dick.* 14.

(*I*) At this day it may be recovered at law.

decreed to be refunded. The Lord Chancellor said, the payment of this 100*l.* was not such a performance of the agreement on one part, as to decree an execution on the other; for the statute of frauds makes one sort of contracts, viz. personal contracts, good, if any money is paid in earnest. Now that statute says, that no agreement concerning lands shall be good, except it is reduced into writing; and therefore, a parol agreement, as it was in that case, would not be good by giving money by way of earnest. Thus far no room is left for doubt; but in *Lacon v. Mertins* (i), Lord Hardwicke laid it down, that paying money had always been considered as a part-performance. This, however, was a mere *dictum*; it was not necessary to decide the question; the cases on the subject were not cited; and another rule is laid down too generally in the same report. A case, indeed, is said to have been decided in 1750 (k), at which time Lord Hardwicke was Chancellor, where the bill was to compel the acceptance of a lease under a parol agreement upon a fine of 150 *l.* and 16 *l.* paid in part of the same; and the plea was overruled, without hearing the counsel for the plaintiff, and the decision, it is said, appears by the Registrar's book (l). But it does not appear from this statement, whether there was or was not any other act of part-performance; and it is a sufficient objection to this decision, that the plaintiff's counsel were not heard, as no one can

(i) 3 Atk. 1.

(k) *Dickinson v. Adams*, 4 Ves. jun. 722, cited.

(l) The author has searched the Registrar's calendars for 1750, with great attention, without meeting the case. He met with only one case where the plaintiff's name was Dickinson, and there the defendant's name was Baskerville; and the case is on a different point. Reg. Lib. A. 1750, fol. 545. Neither does a case in the same book, fol. 544, by the name of *Dauids v. Adams*, embrace the point in question. The search was made under the letter A. as well as the letter D. — Note, the case perhaps turned on the principle stated in page 117, *infra*.

which it ceases to be trifling, and begins to be substantial? If it is to be considered with reference to the amount of the purchase-money, what is the proportion which ought to be paid? Mr. Booth also was impressed with this difficulty, although his sentiments are not so forcibly expressed. Where, he asks, will you strike the line? And who shall settle the quantum that shall suffice in payment of part of any purchase-money, to draw the case out of the statute; or ascertain what shall be deemed so trifling as to leave the case within it (*o*)?

Since the above observations were written, a decision of Lord Redesdale's has appeared, in which he held clearly that payment of purchase-money is not a part-performance; and although his Lordship did not advert to all the cases on the subject, yet it is sincerely to be hoped that his decision will put the point at rest. He said, that it had always been considered that the payment of money is not to be deemed a part-performance, to take a case out of the statute. *Seagood v. Meale* is the leading case on that subject: there a guinea was paid by way of earnest; and it was agreed clearly, that that was of no consequence in case of an agreement touching lands; now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it is paid in both cases as part-payment, and no distinction can be drawn (*p*): but the great reason, his Lordship added, why part-payment does not take such an agreement out of the statute, is, that the statute has said, that in another case, viz. with respect to goods, it shall operate as a part-performance. And the Courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the Legislature said it should bind in case of goods, and

(*o*) 1 Ca. and Opin. 136.

(*p*) See acc. *Cordage v. Cole*, 1 Saund. 319.

It may happen, that although an agreement be in part performed, yet the Court may not be able to ascertain the terms, and then it seems the case will not be taken out of the statute. If, however, the terms be made out satisfactorily to the Court, contrariety of evidence is not material (*x*), and the Court will use its utmost endeavours to get at the terms of the agreement.

In the case of *Mortimer v. Orchard* (*y*), where a parol agreement with two persons had been in part performed, the plaintiff's witness proved an agreement different from that set up by the bill, and the defendants stated an agreement different from both. The Chancellor thought in strictness the bill ought to be dismissed ; but as there had been an execution of some agreement between the parties, and there were two defendants who proved the agreement set up by their answers, he decreed a specific performance of the agreement confessed by the answers.

In one case where, upon the faith of a parol agreement, a man entered and built, it was proved that the defendant told the plaintiff that his word was as good as his bond, and promised the plaintiff a lease when he should have renewed his own from his landlord. Lord Chancellor Jefferies said, that the defendant was guilty of a fraud, and ought to be punished for it ; and so decreed a lease to the plaintiff, *though the terms were uncertain*. It was, he said, in the plaintiff's election for what time he would hold it, and he elected to hold during the defendant's term at the old rent, but the *plaintiff* was to pay costs (*z*).

And in a case from Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, Lord Thurlow sent it to the Master, upon the ground of the possession

(*x*) See 1 Ves. 221.

(*z*) Anon. 5 Vin. Abr. 523, pl.

(*y*) 2 Ves. jun. 243. See *Lind-
say v. Lynch*, 2 Scho. & Lef. 1.

40 ; and see Anon. *ib.* 522. pl.
38.

specific term, and the case stood both on the pleadings and evidence imperfect on that head (*d*). And in a late case before Lord Eldon, he thought the Court must at least endeavour to collect, if they can, what are the terms the parties have referred to (*e*).

But in the case of *Symondson v. Tweed* (*f*), it was laid down, that in all cases wherever the Court had decreed a specific execution of a parol agreement, yet the same had been supported and made out by letters in writing, *and the particular terms stipulated therein*, as a foundation for the decree; otherwise the Court would never carry such an agreement into execution. And in a case before the late Lord Alvanley, when Master of the Rolls (*g*), he is reported to have said, “ I admit my opinion is, that the Court has gone rather too far in permitting part-performance, and other circumstances, to take cases out of the statute, and then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. As to part-performance, it might be evidence of some agreement, but of what, must be left to parol evidence. I always thought the Court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have been a compensation. Those cases are very dissatisfactory. It was very right to say, the statute should not be an engine of fraud, therefore compensation would have been very proper. They have, however, gone farther, saying, it was clear that there was some agreement, and letting them prove it; but how does the circumstance of having laid out a great deal of money, prove that he is to have a lease for ninety-nine

(*d*) *Clinan v. Cooke*, 1 Scho. & Lef. 22.

(*e*) *Boardman v. Mostyn*, 6 Ves. jun. 467.

(*f*) *Prec. Cha.* 374; *Gilb. Eq. Rep.* 35.

(*g*) *Forster v. Hale*, 3 Ves. jun. 712, 713.

tion, on the ground of part-performance, where the terms do not distinctly appear; but notwithstanding the case before Lord Manners, there appears to be abundant authority to prove that the mere circumstance of the terms not appearing, or being controverted by the parties, will not, of itself, deter the Court from taking the best measures to ascertain the real terms (*i*). And we may remark, that it can rarely happen, that an agreement cannot be distinctly proved, where the estate is absolutely sold. Most of the cases on this head have arisen on leases, where the covenants, &c. are generally left open to future consideration.

Where a parol agreement is so far executed as to entitle either of the parties to require a specific execution of it, it will be binding on the representatives of the other party in case of his death, to the same extent as he himself was bound by it (*k*).

In a case before Lord Redesdale (*l*), he held that a contract by a tenant for life with a power of leasing, to grant a lease under his power, was binding on the remainderman. In the course of the argument, a question was put from the bar, whether, if this had been a case of a parol agreement in part performed, it could be enforced? In answer to which, Lord Redesdale expressed himself thus: "That, I think, would raise a very distinct question, a question upon the statute of frauds; and perhaps a remainder-man might be protected by the statute, though the tenant for life would not. For the party himself is bound by a part-performance of a parol agreement, principally on the ground of fraud, which is personal. Such a ground could scarcely be made to apply to the case of a remainder-man, unless

(*i*) See *Savage v. Carroll*, 2 Ball & Beat. 444.

(*k*) *Vide infra*, ch. 4.

(*l*) *Shannon v. Bradstreet*, 1 Scho. & Lef. 52; *Lowe v. Swift*, 2 Ball & Beat. 529.

SECTION IV.

Of the Admissibility of Parol Evidence to vary or annul Written Instruments.

OF this learning we may treat under three heads. 1st, where there is not any ambiguity in the written instrument; 2dly, where there is an ambiguity; and, 3dly, where a term of an agreement is omitted or varied in the written instrument by mistake or fraud.—And,

I. Previously to the statute of frauds, parol evidence might have been given of collateral and independent facts, which tended to support a deed. Thus, although a valuable consideration was always essential to the validity of a bargain and sale, yet Rolle laid it down, that (o) upon *averment* that the deed was in consideration of money, or other valuable consideration given, the land should pass, because the averment was consistent with the deed. The same rule has prevailed since the statute of frauds. Where in a conveyance 28*l.* only were stated to have been received, parol evidence was admitted to prove that 2*l.* more were actually paid (p). And in a later case parol evidence was received, that a sum of money was paid as a premium in order to constitute the relation of master and apprentice, although no mention of it was made in the written agreement entered into between the parties (q). In all these cases we observe, that the evidence is not offered to contradict or vary the agreement, but to ascertain an independent fact, which is consistent

(o) 2 Ro. Abr. 786. (N.) pl. 1; and see 1 Rep. 176 a.

(q) *Rex v. the Inhabitants of Landon*, 8 Term Rep. 379; and

(p) *Rex v. the Inhabitants of Scammonden*, 3 Term Rep. 474. see 2 Cha. Ca. 143.

to show, by parol evidence, that the tenant had agreed to pay the ground-rent for the house to the original landlord, over and above the 26 *l.* a year; but the Court of Common Pleas rejected the evidence.

And upon the general rule of law, as it seems, independently of the statute of frauds, it has been determined that verbal declarations by an auctioneer in the auction-room, contrary to the printed conditions of sale, are inadmissible as evidence, unless perhaps the purchaser has particular personal information given him of the mistake in the particulars (*u*).

In a late case (*v*), upon the sale of timber by a written particular, which was silent as to the quantity, it was attempted to show, that the auctioneer verbally warranted the quantity to be eighty tons, and it was insisted that this evidence was admissible, because it did not *contradict* the particular, but merely supplied its defect in not stating the quantity. But it was held that the evidence was not admissible. Lord Ellenborough said, that the purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, he knew of no instance where a party might not, by parol testimony, superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There was no doubt, his Lordship added, that the warranty as to the quantity of timber would not vary the agreement contained in the written conditions of sale.

So, since the act of Parliament for altering the style, a demise from Michaelmas must be taken to be from

(*u*) *Gunnis v. Echert*, 1 H. v. Clowes, 15 Ves. jun. 516.

Blackst. 289. See 13 Ves. jun. 471, and *infra*; and *Fife v. Clayton*, 13 Ves. jun. 546; *Higginson*

(*v*) *Powell v. Edmunds*, 12 East, 6; *Jones v. Edney*, 3 Campb. 285.

upon the extent of the written agreement ; and the parol evidence being objected to at the hearing, it was not permitted to be read.

And in an important case before Lord Eldon (c), his Lordship refused to execute an agreement with a variation attempted to be introduced by parol, on the ground of mistake, or at least of surprise, which was denied by the answer. So in the late case of *Woollam v. Hearn* (d), where a specific performance was sought of an agreement for a lease, at a less rent than that mentioned in the agreement, which variation was introduced by parol, on the ground of fraud and misrepresentation in the landlord ; the evidence was read without prejudice, and the Master of the Rolls thought it made out the plaintiff's case ; but his Honor held himself bound by the authorities, and accordingly rejected the evidence, and dismissed the bill. And this doctrine has been distinctly recognized by Lord Redesdale (e).

So verbal declarations, in opposition to printed conditions of sale, are inadmissible as evidence in equity as well as at law (f).

And if a material term be added by one party to a written agreement after its execution, he destroys his own rights under the instrument. But although this doctrine has been referred to the statute of frauds, yet it seems rather to depend on the principles of the common law (g).

But when equity is called upon to exercise its peculiar jurisdiction, by decreeing a specific performance, *the party to be charged* is to be let in to show, that, under the cir-

(c) *Marquis of Townshend v. Stangroom*, 6 Ves. jun. 328. See 1 Ves. & Bea. 526, 527.

(d) 7 Ves. jun. 211.

(e) 1 Scho. & Lef. 39.

(f) *Jenkinson v. Pepys*, 6 Ves.

jun. 330, cited ; 15 Ves. jun. 521 ; 1 Ves. & Bea. 528 ; see 15 Ves. jun. 171, 546 ; *Higginson v. Clowes*, 15 Ves. jun. 516.

(g) *Powell v. Divett*, 15 East,

29.

he sold it for forty-one acres, and if it was less an abatement should be made, his Honor admitted the evidence and dismissed the bill, because after such a declaration made by the auctioneer, it was fraudulent and unfair in the seller to insist upon the execution of the contract, not giving the defendant the benefit of that declaration (*o*).

So where by the *mistake* of the solicitor the agreement only required the purchaser to bear the expense of the conveyance, whereas the real agreement was, that he should also bear the expense of making out the title, the Master of the Rolls admitted parol evidence of the real agreement and of the mistake; and upon the strength of it, his Honor gave the plaintiff, the purchaser, his option to have his bill, which was for a specific performance according to the terms of the written agreement, dismissed, or to have the agreement performed in the way contended for by the seller (*p*).

But in a case where a written agreement for a lease varied in part by parol, and upon a bill filed by the tenant for a specific performance of the original agreement, the landlord set up a subsequent parol waiver of the written agreement, and a new agreement entered into at his solicitor's, every term of which was to the disadvantage of the plaintiff, without any consideration for the variation; the Master of the Rolls decreed a specific performance according to the prayer of the bill. His Honor considered the case made *out by the landlord* (*q*) *not a waiver of the contract*, but a variation by parol which had not been acted upon, and which was made without consideration. The

(*o*) *Winch v. Winchester*, 1 Ves. & Beam. 375.

(*p*) *Ramsbottom v. Gosden*, 1 Ves. & Beam. 165. See *Flood v. Finlay*, 2 Ball & Beatty, 9; *Lord William Gordon v. Marquis*

of Hertford, 2 Madd. 106; *Garrard v. Girling*, 1 Wils. Ch. Cas. 460; 1 Swanst. 244.

(*q*) *Price v. Dyer*, MS.; S. C. 17 Ves. jun. 356; *Robinson v. Page*, 3 Russ. 114.

pay for the timber, although the auctioneer declared that it was to be paid for.

The case before Lord Eldon(*s*) shows the rule of equity in a strong light. The landlord filed a bill for a specific performance of the written agreement, varied by the parol evidence; the tenant filed a cross-bill for a specific performance of the written agreement. The result was, that both bills were dismissed; the first, because parol evidence was not admissible as a foundation for a decree *enforcing* a specific performance; the second, on the ground that such evidence was admissible to rebut the equity of the plaintiff in the second bill.

A similar case appears to have been decided by Lord Chancellor Macclesfield. The case has, I believe, never been cited, and it requires some attention to get at the facts. They appear, however, to be, that the plaintiff in the first bill sought a specific performance of an agreement by him to grant a lease to the defendant. The defendant set up a parol agreement, by which he was to have liberty to grub bushes, and exhibited a cross-bill for a performance *in specie* of the written agreement, with the addition of a clause to grub bushes according to the parol agreement, and both the bills were dismissed, but without costs(*t*).

Upon the admissibility of parol evidence, as a defence to a bill seeking a specific performance, Lord Redesdale has forcibly observed, that it should be recollected what are the words of the statute: "No person shall be charged upon any contract or sale of lands, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." No

(*s*) Lord Townshend v. Stan-
groom.

(*t*) Hosier v. Read, 9 Mod. 86.

I have searched the Register's
books for this case without suc-
cess.

objected to the evidence being read. He said, that it was urged for the defendant, that evidence may be read where the parol agreement is not inconsistent with the written agreement. This, (that is, the parol agreement, in the case before him,) he added, was to further the written agreement, and to secure what was through carelessness omitted to be provided for in the written agreement, viz. delivery of possession, according to the custom of the country. Mr. Baron Graham said, that the parol agreement could only be admitted where the written agreement was not drawn according to the intention of the parties at the time. You cannot by parol add any thing to what was the real agreement at the time, after that has been correctly reduced into writing. And he entirely agreed with Mr. Justice Chambre, that the parol could not be made to form part of the written agreement.

Lord Hardwicke is reported (*z*) to have said, that a plaintiff seeking a specific performance might enter into parol evidence to show that the defendant was to pay the rent clear of taxes, no mention being made of taxes in the agreement; because it was an agreement executory only, and as, in leases, there were always covenants relating to taxes, the Master would inquire what the agreement was as to taxes, and therefore the proof would not be a variation of the agreement. And this extra-judicial opinion appears to have been approved of by two enlightened Judges (*a*), one of whom (*b*) laid it down, that parol evidence was admissible to prove collateral matters, concerning which nothing was said in the agreement, as who was to put the house in repair, or the like.

But notwithstanding these *dicta*, it has been expressly

(*z*) 3 Atk. 389, 390; but see 4 Bro. C. C. 518; 6 Ves. jun. 335, n. 1 Scho. and Lef. Rep. 38.

(*a*) See 2 Blackst. 1250; 7 Ves. jun. 221.

(*b*) Mr. Justice Blackstone.

Lord Rosslyn, then Lord Chancellor, who said, that the prior conversations, and the manner of drawing up the agreement by one party, and signing it by another, would have no influence. The real question was, whether in equity, any more than at law, the evidence ought to be admitted; whether there is any distinction in a court of equity, where a party comes to enforce a written agreement by obtaining a more formal instrument, and to add, in doing that, a term not expressed in the written agreement, and of such a nature as to bear against the written agreement. He had looked into all the cases, and could not find that the Court had ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circumstance that parol evidence could introduce. And he accordingly dismissed the bill, but without costs.

Indeed Lord Rosslyn appears to have made a similar decision in a case prior to that of *Rich v. Jackson*. The case to which I allude is *Jordan v. Sawkins* (*d*); where a bill was filed for a specific performance of a lease, and it was stated, that there was a memorandum annexed to the original agreement, that the tenant (I) was to pay the land-tax (which, it must be presumed, was not signed, and was therefore only tantamount to a parol agreement). The cause was heard before the Lords Commissioners Eyre, Ashurst, and Wilson, who decreed a performance of the contract with the variation, that it was to be at a clear rent of 40 *l. without deducting land-tax*. The cause was re-heard before Lord Rosslyn, who said, that if the agreement had

(*d*) *Jordan v. Sawkins*, 3 Bro. and Lef. 305; and see the cases C. C. 388; 1 Ves. jun. 402; and *infra*, as to the discharge of a parol agreement. see *O'Connor v. Spaight*, 1 Scho.

(I) In the Report, the name of the landlord is, by mistake, printed for that of the tenant.

original contract (*g*); notwithstanding which, it is universally considered, that an agreement in writing concerning land may be *discharged*, although it cannot be varied by parol (*h*). And in a late case, where all the authorities were mentioned, but in which it was not necessary to decide the point (*i*), the Master of the Rolls appeared to consider that a written agreement might be abandoned by parol.

The first case on this head, is a short note in Vernon (*k*), where the precise point occurred, and the Lord Keeper held, that the agreement might be discharged by parol, and therefore dismissed the bill, which was brought to have the agreement executed *in specie*. The next case is reported by Viner (*l*). The case was, that *A.* leased a house to *B.* for eleven years, and was to allow 20*l.* to be laid out in repairs; the agreement was reduced into writing, and signed and sealed by both parties. *B.* repaired the house, and finding it to take a much greater sum than the 20*l.*, told *A.* of it, and that he would nevertheless go on and lay out more money if he would enlarge the term to twenty-one years, or add fourteen, or as many as *B.* should think fit. *A.* replied, that they would not fall out about that, and afterwards declared that he would enlarge the term, without mentioning the term in certain. The question was, whether this new agreement, made by parol, which varied from the written agreement, should be carried into execution, notwithstanding the statute of frauds. The Master of the Rolls said, that before the statute, a written agreement could not be controlled by

(*g*) 2 Eq. Ca. Abr. 33.

(*h*) 1 Ves. jun. 404; 4 Bro. C. C. 519; 6 Ves. jun. 337, n.; 9 Ves. jun. 250; 3 Wooddes. 428, s. iv.; Rob. on Stat. of Frauds, 89; and Inge v. Lippingwell, 2 Dick. 469; but see Kaye v. Waghorn, 1 Taunt. 423.

(*i*) Price v. Dyer, MS. Rolls;

S. C. 17 Ves. jun. 356, *post*.

(*k*) Goman v. Salisbury, 1 Vern. 240. I could not discover any trace of this cause in the Register's book.

(*l*) Anon. 5 Vin. 522, pl. 38; 4 Geo.

that if the party came into equity for a specific execution, such parol waver would rebut the equity which the party before had, and prevent the Court from executing them specifically (*n*).

The case of *Legal v. Miller*(*o*), comes next in point of time. The agreement was for taking a house at 32*l.* per annum, and part of the agreement was, that the owner should put the house in repair. It was afterwards discovered not to be worth while barely to repair the house, but better to pull it down; and, therefore, without any alteration in the written agreement, the house was pulled down by consent of the tenant, apprised of the great expense it would be to the landlord; and, therefore, an agreement was made by parol only, on the part of the tenant, to add 8*l.* per annum to the 32*l.* The tenant brought a bill for specific performance, on the foot of the written agreement, by which he was to pay only the 32*l.* rent. The defendant, by his answer, set up the parol agreement. Sir John Strange said, such evidence is frequently suffered to be read, especially to rebut such an equity as now insisted on by the bill: as where the agreement is in part carried into execution, parol evidence is allowed to prove that; *or where it is a hard agreement; and the Court may, therefore, decree against the written agreement, as in 1 Vern. 240, (Goman v. Salisbury);* and the single question being here, whether the Court should decree a specific performance of the agreement the plaintiff insists upon, and being satisfied, from the parol evidence, that it should not, the Court must dismiss the bill. And in the subsequent case of *Pitcairne v. Ogbourne*(*p*), Sir John Strange referred to this decision, and approved of it.

(*n*) *Bell v. Howard*, 9 Mod. 302;
and see *Earl of Anglesea v. Annes-*
ley, 4 Bro. P. C. 421.

(*o*) 2 Ves. 299.

(*p*) 2 Ves. 375.

although it would be inadmissible as a ground for relief. In the case in *Viner*, indeed, the person relying on the parol agreement was plaintiff; but the new agreement was in part performed by him, and the Master of the Rolls of that day expressly founded his decree on that ground. No case seems to go beyond that. In the case of *Price and Dyer*, the parol agreement was not, under the circumstances, held to be a sufficient *defence*.

Whether an absolute parol discharge of a written agreement, not followed by any other agreement upon which the parties have acted, can be set up even as a defence in equity, seems questionable. The result of the authorities as to a parol variation, appears to be,

1st, That evidence of it is totally inadmissible at law.

2dly, That in equity the most unequivocal proof of it will be expected.

3dly, That if it be proved to the satisfaction of the Court, and be such a variation as the Court will act upon, yet it can only be used as a *defence* to a bill demanding a specific performance, and is inadmissible as a ground to *compel* a specific performance, unless,

4thly, There has been such a part performance of the new parol agreement, as would enable the Court to grant its aid in the case of an original independent agreement, and then, in the view of equity, it is tantamount to a written agreement.

In considering the point under discussion, the reader will be careful not to confound the foregoing cases with the case of *Walker v. Constable* (r). There the *original* agreement was a *parol* agreement; and the question was, whether, being abandoned, parol evidence could be given of it. Lord C. J. Eyre held, that the existence and the terms of the agreement must be proved before it could be

(r) 2 Esp. 659; 1 Bos. and Pull. 306. See *Adams v. Fairbairn*, 2 Stark. 277.

In some cases a latent ambiguity may be fatal. Parol evidence may be adduced to prove the ambiguity, when none sufficiently satisfactory can be offered to explain it (*y*). And to render parol evidence admissible in these cases, a clear latent ambiguity must be first shown.—Evidence which merely raises a conjecture is insufficient (*z*).

But although a latent ambiguity may be aided by parol evidence, yet a patent ambiguity cannot be aided by extrinsic evidence, because that would in effect be to pass without deed, what by the law can be passed by deed only. Of this Lord Chancellor Bacon observes, infinite cases might be put; for it holdeth generally, that all ambiguity of words, by the matter within the deed, and not out of the deed, shall be helped by construction, or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty.

In *Mansell v. Price*, personal estate was settled in trust for Price the defendant, and Catherine his wife, for their lives, and the life of the survivor of them, and then for their issue, with a power to the wife to dispose of 1,500*l.*, part of the monies, to any persons she pleased. She exercised this power by giving the money to Sir Edward Mansell, in trust to pay 1,000*l.* to *A*, when she should attain twenty-one, or marry; but if she died before twenty-one, or marriage, then it should be to such uses as *B*. should appoint. And the other 500*l.* she directed to be paid to *C*, in exactly the same terms as before. The bill was filed by the guardian of *A*. and *C*, infants, to have the money paid, and to be put out for them to have the interest thereof immediately. For the defendant Price, it was insisted that he was entitled to the

(*y*) *Thomas v. Thomas*, 6 Term Rep. 671.

Earl of Cholmondeley, 7 Term Rep. 138.

(*z*) See *Lord Walpole v. the*

interest of 1,500*l.*, until it should become payable. The first question was, whether parol evidence could be admitted to explain the intention of Catherine Price what should become of the interest till the times of payment; for if that could be admitted, there was sufficient to prove the husband should not have it. And the Master of the Rolls was of opinion that such evidence could not be read (*a*).

So in *Kelly v. Powlet* (*b*), the question was, whether plate passed under a bequest of household furniture. The drawer of the will said, it was *not* intended; but his evidence was refused, and the plate was held to pass.

Again, in a case in the Exchequer (*c*), it appeared that, by an act of parliament, cast plate-glass was directed to be *squared* into plates of certain dimensions. The question was, whether certain plates were in the shape directed by the act. The Attorney-general at the trial produced books explaining the process and terms of art in the manufacture, and the defendants offered evidence to prove the technical meaning in the trade of the word *squaring* glass; the evidence was, however, refused, and a verdict found against the defendants: and upon a motion for a new trial, Lord Chief Baron Eyre said: In explaining an act of parliament, it is impossible to contend that evidence should be admitted, for that would be to make it a question of fact, in place of a question of law. The judge is to direct the jury as to the point of law, and in doing so must form

(*a*) MS. T. Term, 8 and 9 Geo. II.; and see *Hart v. Durand*, 8 Anstr. 684; *Chamberlaine v. Chamberlaine*, 2 Freem. 52; *Ulrich v. Ditchfield*, MS. 2 Atk. 372, where the evidence was not received.

(*b*) 1 Bro. C. C. 476, cited; *Ambl.* 605, reported, which I con-

ceive has overruled *Pendleton v. Grant*, 1 Eq. Ca. Abr. 230, pl. 2; 2 Vern. 517; and see 1 Bro. C. C. 350, 351; *Seymour v. Rapier*, Bunb. 28; *Doe v. Bland*, 11 East, 441.

(*c*) *Attorney-general v. the Cast Plate-Glass Company*, 1 Anstr. 39.

his judgment of the meaning of the Legislature, in the same manner as if it had come before him on demurrer, when evidence would be admitted. Yet on a demurrer a judge may well inform himself from dictionaries or books, on a particular subject concerning the meaning of any word. He does so at *nisi prius*, and shows them to the jury, though they are not to be considered as evidence, but only as grounds on which the judge has formed his opinion, as if he were to cite any authorities for the point of law he lays down.

So parol evidence is inadmissible to restrain the legal operation of general words in an instrument. Therefore it cannot be admitted to prove, that a particular estate was not intended to pass under general words sufficient to comprise it.

Thus in *Davis v. Thomas* (*d*), a husband and wife being seised of settled estates in the county of Pembroke, bought an estate in the same county, called Rigman Hill, which was conveyed to them, and the survivor in fee. The husband having prevailed on the wife to join with him in suffering a recovery of the settled estates, in order to enable him to mortgage them, gave the attorney employed to suffer the recovery a particular description of the settled estates, which did not comprise Rigman Hill; and it *clearly* appeared from several circumstances, that he had not any intention to comprise that estate, the title-deeds of which were in his wife's custody. The attorney, fearful of not comprising the whole estate, and not knowing that Rigman Hill had been purchased, added general words sufficient to comprise that estate. The recovery was suffered to the use of the husband in fee, who afterwards mortgaged the estate by the same description. The

(*d*) Reg. Lib. 1757, fol. 33, 34. See *Thomas v. Davis*, 1 Dick. 301, *et infra*.

&c. in order to enable them to construe ambiguous or ill-penned instruments, although parol evidence of the intention of the parties could not be received, and this has been sanctioned by a leading case in the House of Lords (*g*).

In one case (*h*), where it was doubtful whether a covenant for renewal extended to a perpetual renewal, and the parties had renewed four times successively under the covenant, Lord Mansfield and the other Judges of the King's Bench held, that the parties themselves had put a construction upon the covenant, and were therefore bound by it. Lord Alvanley, who was in the cause, said, when Master of the Rolls, that he was never more amazed than at this decision, and that Mr. Justice Wilson, who argued with him, was astonished at it (*i*); and his Lordship more than once expressed his marked disapprobation of this doctrine (*k*). Lord Eldon (*l*), and Sir Wm. Grant (*m*), have both also dissented from it; and Lord C. J. Mansfield, in a late case, observed, that it was a case which had been impeached upon all occasions (*n*). And it appears to be now clearly settled, that in the *construction* of an agreement or deed, the acts of the parties cannot be taken into consideration (*o*).

Where, however, the words of an *ancient* statute or instrument are doubtful, *contemporaneous* usage, although

(*g*) Sir John Eden *v.* the Earl of Bute, 7 Bro. P. C. 745. See Countess of Shelburne *v.* the Earl of Inchiquin, 1 Bro. C. C. 338.

(*h*) Cook *v.* Booth, Cowp. 819; and see Blackst. 1249; 1 New Rep. 42. See Peake on Evid. ch. 2.

(*i*) Baynham *v.* Guy's Hospital, 3 Ves. 295; and see 2 Ves. jun. 448.

(*k*) See Eaton *v.* Lyon, 3 Ves. jun. 690.

(*l*) See Iggulden *v.* May, 9 Ves. jun. 325.

(*m*) See Moore *v.* Foley, 6 Ves. jun. 232.

(*n*) See 2 New Rep. 452.

(*o*) See Clifton *v.* Walmsley, 5 Term Rep. 564; and see Iggulden *v.* May, 7 East, 237.

in writing, as well as against frauds and contracts ; so that if reduced into writing contrary to the intention of the parties, on proper proof that would be rectified ; he thought, however, that in these cases there should be the strongest proof possible. In a case which was much agitated before Lord Thurlow, he laid down the rule with great latitude, that if a mistake appears, it is as much to be rectified as fraud (*t*). So in another case before the same Chancellor, he said that he thought it impossible to refuse, as incompetent, evidence which went to prove that the words taken down were contrary to the concurrent intention of all parties. To be sure, his Lordship added, it must be strong, irrefragable evidence, but he did not think he could reject it as incompetent (*u*).

Lord Eldon, observing upon these *dicta*, said, that Lord Thurlow seemed to say that the proof must satisfy the Court what was the concurrent intention of all parties ; and his Lordship added, *it must never be forgot to what extent the defendant, one of the parties, admits or denies the agreement*. In the case before Lord Eldon (*x*), a specific performance of an agreement was sought, with a variation attempted to be introduced by parol, on the ground of mistake and surprise, which was positively denied by the defendant. And his Lordship said, that he would not say, that upon the evidence without the answer, he should not have had so much doubt whether he ought

(*t*) Taylor v. Radd, 5 Ves. jun. 338 ; and see Cock v. Richards, 595, cited. 10 Ves. jun. 441.

(*u*) Countess of Shelburne v. the Earl of Inchiquin, 1 Bro. C. C. (x) Marquis of Townshend v. Stangroom, 6 Ves. jun. 328.

v. Micklem, 6 East, 486 ; see Lane v. Goudge, 9 Ves. jun. 225 ; Mellish v. Mellish, and Phillips v. Chamberlain, 4 Ves. jun. 45, 51 ; but however evident the mistake may be, the words will not be supplied if the testator's manifest intention would be defeated by the insertion of them. Chapman v. Brown, 3 Burr. 1626. See 2 Ves. jun. 365.

sequence of that, Lord Talbot made a decree to relieve the plaintiff against any difficulty by the variation.

The hesitation with which parol evidence is received in equity to correct even mistakes in agreements and deeds, is strongly exemplified by a case before Sir William Fortescue(*a*). Previously to marriage an estate was agreed to be settled on the intended husband for life, remainder to the wife for life, remainder to the sons successively in tail male, remainder to all the daughters. Instructions were given to an attorney to draw the settlement, who drew it as far as the limitations to the sons, where he stopped, and said, then go on as in *Pippin v. Ekins*; which was a precedent he delivered to his clerk, to go on from that limitation, and was a right settlement to the issue male and daughters by that wife; but the clerk drew the settlement to all the daughters of the husband, without restraining it to that marriage: it was executed with this mistake: the question arose between an only daughter of that marriage and children of the husband's by the second wife. The draft of the attorney was proved, and the settlement in *Pippin v. Ekins*; but the Court would not admit parol evidence of the attorney to be read, and held that the other evidence would not do; that nothing appearing in writing under the hands of the parties, the settlement could not be altered. And Sir Thomas Clark is reported to have said (*b*), that as to the head of the mistake, he did not give a positive opinion, but he did not think the Court had relied upon parol evidence singly.

But whatever difficulty there may be of admitting parol evidence singly, yet it is always admitted where it is corroborated by other evidence.

This doctrine was carried a great way in the case of

(*a*) *Harwood v. Wallis*, 2 Ves. 195, cited.

(*b*) 1 Dick. 295.

case, that the application was made to the Court of Chancery to correct the mistake, in the same manner as applications are made to that Court to correct marriage articles where clauses are inserted contrary to the intent of the parties. It seems clear, however, that the relief in this case was founded on parol evidence *that the vendor sold only such estate as he had*, corroborated as it was by the form of the deed and the subject of the contract. Such evidence was received in the prior case of Dr. Coldcot and Serjeant Hide, and is still clearly admissible.

Thus in *Young v. Young* (g), the plaintiff married Lucy, a defendant, and an infant; the husband stated, or drew by way of instructions to his attorney, what the wife's fortune then was, and agreed to add as much to be settled in strict settlement, and likewise stated that the intended wife had a prospect of an additional fortune; to which he agreed, provided it did not exceed 1,000*l.*, to add a like sum, to be likewise settled strictly, and he to have the excess. The settlement was prepared according to the instructions; but the solicitor having, in the margin of the draft, added double the sum, the settlement was prepared and executed according to that mistake. Parol evidence was admitted to prove the mistake; that is, the settlement was first shown to differ from the written instructions, and parol evidence of the counsel and attorney was then received, to prove the mistake.

This equity was administered in the case of *Thomas v. Davis* before cited (h), where it clearly appeared, that the estate in question was not intended to be comprehended in the general words. This appeared from many circumstances, but particularly from the description of the estate given by the husband to the attorney by way of

(g) 1 Dick. 295, cited. See
1 Dick. 303, 304.

(h) *Supra*, p. 146; 1 Dick. 301;
Reg. Lib. B. 1757, fol. 33, 34.

a portion of church-tithes upon a purchase was made, contrary to what was considered to be the true construction of the written agreement, subject to a proportion of the rent reserved by the lease of the tithes; and upon proof that this was done by the mistake of the *purchaser's* attorney, and that the rent had not been demanded for several years, the deed was after the lapse of several years rectified and made conformable to the written agreement.

If a settlement be made contrary to the intention of the parties, merely to prevent a forfeiture (II), parol evidence is admissible of the real intent of the parties (I), and the settlement will be rectified in conformity with it.

Where parties omit any provision in a deed, on the impression of its being illegal, and trust to each other's honour, they must rely upon that, and cannot require the defect to be supplied by parol evidence.

Thus in *Lord Irnham v. Child* (*m*), it appeared that Lord Irnham treated with Child for sale of an annuity. Upon settling the terms, it was agreed that the annuity should be redeemable; but both parties supposing that this appearing upon the face of the transaction would make it usurious, it was agreed that the grant should not have in it

(l) *Harvey v. Harvey*, 2 Cha. series; and see Fitzgib. 213, 214: Ca. 180, decided the same way, see Stratford v. Powell, 1 Ball and first by Sir Harbottle Grimston, Beatty, 1. then by Lord Nottingham, and (m, 1 Bro. C. C. 72 afterwards by Lord Chancellor Jef-

(II) In this case the settlement was to prevent the estate from being sequestered on account of the husband having been in debt for Charles the first. The decree was made in the reign of James his son. So that as to the nature of the forfeiture, it is evident that the relief of equity would not have been afforded, for the purpose of upholding the settlement, except under the Restoration!

out those limitations, but also the limitation to the wife for life, and the subsequent limitation to trustees to preserve, and the deed was executed without the mistake being discovered, whereby, as the bill stated, the said power for appointing the reversion of the premises was made to take place on the decease of the plaintiff generally, though the limitation to him was only during the joint lives. The wife exercised her power by deed in favour of her husband during his life, and then by will gave him the fee, and then died in his life-time. Her heir at law insisted that the use resulted to him during the husband's life, and that there being no trustee to preserve contingent remainders, the devise in the will as an execution of the power, not taking effect till the determination of the particular estate, was void, and brought an ejectment against the husband, and obtained a verdict (I). The husband then filed a bill for an injunction, and to rectify the mistake in the settlement. The defendant, by his answer, urged that the draft of the settlement might have been altered with a view to support the husband's claim, and insisted that parol evidence could not be received; but Sir Thomas Clark decreed, that the power appeared to have been designed so far to extend as to enable her to dispose of the interests in the estates after the determination of the coverture, and during the life of her husband, as well as to dispose of the inheritance of the estates after her husband's decease, and ordered the settlement to be rectified accordingly; but without costs on either side.

In the last case upon this subject (*k*), a conveyance of

(*k*) *Rob v. Butterwick*, 2 Price, 190; and see *Beaumont v. Bramley*, 1 Turn. 41.

(I) The first point at least was clear at law, but the defendant set up an old term as a bar to the plaintiff's right to recover. The defence, however, did not succeed. See *Farmer dem. Earl v. Rogers*, 2 Wils. 26.

a clause of redemption ; and it was accordingly drawn and executed without such a clause. Lord Thurlow refused to supply the omission. A similar decision was made by Mr. Justice Buller, when sitting in Chancery for the Lord Chancellor (*n*) ; and two similar determinations were made by Lord Kenyon, when Master of the Rolls (*o*).

Upon these cases Lord Eldon observes, that they went upon an indisputably clear principle, that the parties did not mean to insert in the agreement a provision for redemption, because they were all of one mind that it would be usurious ; and they desired the Court to do not what they intended, for the insertion of that provision was directly contrary to their intention ; but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention. The answer is, they admit it was not to be in the deed ; and why was the Court to insert it, where two risks had occurred to the parties ; the danger of usury, and the danger of trusting to the honour of the party ?

But fraud is in equity an exception to every rule. In the case of Lord Irnham *v.* Child, Lord Thurlow distinctly said, if the agreement had been varied by fraud, the evidence would be admissible. If the bill stated that the clause was intended to be inserted, but it was suppressed by fraud, he could not refuse to hear evidence read to establish the rule of equity. Lord Kenyon advanced the same doctrine in the cases before him, and Mr. Justice Buller

(*n*) *Hare v. Shearwood*, 1 Ves. jun. 241 ; 3 Bro. C. C. 168. See and consider *Haynes v. Hare*, 1 Hen. Blackst. 659. (I)

(*o*) *Lord Portmore v. Morris*, 2 Bro. C. C. 219 ; 1 Hen. Blackst. 663, 664 ; *Rosamond v. Lord Mel-sington*, 3 Ves. jun. 40, n.

(I) Perhaps this case does not belong to this line of cases, but should be classed with those in which a term is omitted by mistake ; of which *vide supra*.

trolling power over its own judgments entered up under warrant of attorney, where the party entering them up has been guilty of a fraud (*u*). The case, however, went off on another ground.

In the *Countess of Shelburne v. the Earl of Inchiquin* (*x*), Lord Thurlow said, if two persons entrust a third person to draw up minutes of their intention, and such person does not draw them according to such intention, that case might be relieved, because that would be a kind of fraud.

And it is said, that in the case of *Jones v. Sheriffe* (*y*), there were heads of an intended lease taken by an attorney in writing; but upon proof that some other clauses were agreed on between the parties at the same time, the Court decreed that those clauses should be put into the lease, notwithstanding the counsel on the other side strenuously insisted on the statute of frauds.

And if either party object to a conveyance, on the ground of the term of agreement being omitted, and the other party promise to rectify it, whereupon the deed is executed, a specific performance of the promise will be enforced.

Thus in *Pember v. Mathers* (*z*), a bill was filed for a specific performance of a parol agreement by a purchaser of a lease under written conditions, to indemnify the vendor against the rent and covenants; and it was objected, on the part of the defendant, that the evidence was inadmissible, upon the ground, that where the parties have entered into a written agreement, no parol evidence can be admitted to increase or diminish such agreement. The rule, Lord Thurlow said, was right; but where the

(*u*) See 1 H. Blackst. 63, 664. 195; *Baker v. Paine*, 1 Ves. 456.

(*x*) 1 Bro. C. C. 350; and see (*y*) 9 Mod. 88, cited.

Crosby v. Middleton, 3 Cha. Rep. (*z*) 1 Bro. C. C. 52; see 14 Ves. 99; *Langley v. Brown*, 2 Atk. jun. 524.

CHAPTER IV.

OF THE CONSEQUENCES OF THE CONTRACT.

SECTION I.

Of the Rule in Equity, that the Purchaser is entitled to the Estate from the time of the Contract.

EQUITY looks upon things agreed to be done, as actually performed (*a*), (I); consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold (*b*), and the purchaser as a trustee of the purchase-money for the vendor (*c*).

Therefore the contract will not be discharged by the bankruptcy of either the vendor (*d*) or vendee (*e*) (II).

(*a*) Francis's Maxims, max. 13; 1 Trea. Eq. ch. 6, s. 9. See Callaway v. Ward, 1 Ves. 318, cited.

(*b*) Atcherley v. Vernon, 10 Mod. 518; Davie v. Beardsham, 1 Cha. Ca. 39; and Lady Fohaine's case, cited *ibid.*; and see 1 Term Rep. 601; and Green v. Smith, 1 Atk. 572.

(*c*) Green v. Smith, *ubi supra*;

Pollexfen v. Moore, 3 Atk. 272.

(*d*) Orlebar v. Fletcher, 1 P. Wms. 737. The observation in Goodwin v. Lightbody, 1 Dan. 156, appears to be inaccurate.

(*e*) See 3 Ves. jun. 255; and Bowles v. Rogers, 6 Ves. jun. 95, n.; Whitworth v. Davis, 1 Ves. & Bea. 545.

(I) A lessee insured his house, the lease expired, and he contracted for a new lease. Then the house was burned, and the office insisted that at the time of burning it was not the plaintiff's house; but Lord Chancellor King, and afterwards the House of Lords, held otherwise. See printed cases, Dom. Proc. 1730.

(II) As to the effect of an extent subsequently to a contract, see Box v. Snow, 1 Price, 220, cited.

his power, the money will, as between his creditors and appointees, be assets (*m*).

If the estate is under a contract for sale at the date of the will, a devise of it to be sold for a charity, will give the purchase-money to the charity, notwithstanding the mortmain act, as it is called (*n*).

A vendee being actually seised of the estate in contemplation of equity, must, as we shall hereafter see, bear any loss which may happen to the estate between the agreement and conveyance, and will be entitled to any benefit which may accrue to it in the interim (*o*); but if he obtain possession of the estate before he has paid the purchase-money, and begin to cut timber, equity will grant an injunction against him (*p*).

If the purchaser was tenant at will of the estate, the contract determines the tenancy. And even if he was tenant for a term certain, the agreement determines the relation of landlord and tenant, and in equity, at least, the landlord cannot call for rent (*q*).

It is a consequence of the same rule, that a purchaser may sell or charge the estate, before the conveyance is executed (*r*); but a person claiming under him must submit to perform the agreement *in toto*, or he cannot be relieved (*s*).

So he may devise the estate, if freehold (*t*), before

(*m*) *Thompson v. Towne*, 2 Vern. 319, 466.

(*n*) *Middleton v. Spicer*, 1 Bro. C. C. 201.

(*o*) See *post*, ch. 5.

(*p*) *Crockford v. Alexander*, 15 Ves. jun. 138.

(*q*) *Daniels v. Davison*, 16 Ves. jun. 249.

(*r*) *Seton v. Slade*, 7 Ves. jun. 265; and see 1 Ves. 220; and 6 Ves. jun. 352. *Wood v. Griffith*,

12 Feb. 1818. MS. see *post*; 2 Ball & Beat. 522.

(*s*) See *Dyer v. Pulteney*, Barnard. Rep. Cha. 160; a very particular case.

(*t*) *Darris's case*, 3 Salk. 85; *Milner v. Mills*, Mose. 123; *Alleyn v. Alleyn*, Mose. 262; *Atcherley v. Vernon*, 10 Mod. 518; *Gibson v. Lord Montfort*, 1 Ves. 485.

cases which have established the contrary doctrine; and; indeed, in a case before Sir Thomas Sewell, a few years after that of *Ardesoife v. Bennet*, he seems to allude to a devise of a copyhold estate contracted for, as sanctioned by practice (c)

An estate contracted for will pass by a general devise of all the lands purchased by the testator, although he may have purchased some estates which have been actually conveyed to him, and would therefore of themselves satisfy the words of the will (d).

On the other hand, it seems that estates recently purchased *and actually conveyed*, will pass with estates contracted for, by a general devise of all the manors, &c. for the purchase whereof the testator has *already* contracted and agreed (e), (I). But a devise of estates “for the purchase whereof the testator has *only* contracted and agreed,” would not pass estates actually conveyed to him before the will, unless perhaps they were recently purchased, and the testator had not contracted for any other estate.

If a man possessed of a term of years contract for the purchase of the inheritance, the term, by construction of equity, instantly attends the inheritance; and therefore, by a devise of the estate subsequently to the contract, the fee-simple would pass, although not actually conveyed, and the term as attendant on it (f).

(c) *Floyd v. Aldridge*, 1777, 5 East, 137, cited; and see *Vernon v. Vernon*, 7 East, 8. ton, Cowp. 94; Lofft, 113, 349, S. C.; and 2 Blackst. 930.

(d) *Atcherley v. Vernon*, 10 Mod. 518.

(e) *St. John v. Bishop of Win-*

(f) *Per Sir Wm. Grant, in case Capel v. Girdler*, Rolls, 16 May 1804, MS.; 9 Ves. jun. 509; *Cooke v. Cooke*, 2 Atk. 67.

(I) This, however, must depend upon the particular circumstances of each case. The case referred to can scarcely be cited as a binding authority establishing a general rule. It seems that the House of Lords was taken by surprise in affirming the judgment.

the heir at law, and he will in equity be deemed a mere trustee for the devisee, unless the devisee, thinking the

revoke the will. It is difficult to state that, at this time of day, in a court of law, which could not look at the equitable interest, but looks only at the legal ; but as the legal interest is only a shadow, the justice of the case is very evident ; but it is a decision in conformity to the like case at law. The very case occurred at law in Roll. Abr. 616, pl. 3. *Cestui que use*, before the *statute of uses*, devises ; afterwards the feoffees made a feoffment of the land to the use of the devisor ; and after the statute the devisor dies ; the land shall pass by the devise ; because, after the feoffment, the devisor had the same use which he had before. That is exactly the case of an equitable estate devised, and a conveyance taken afterwards of the legal estate ; and this Court was so far from determining without considering what the rule of law would be, that here is the very point decided by a court of law."

The case referred to is thus stated in Rolle ;—" *Si home aiant feffees a son use devant le statut de 27 H. 8. ust devise le terre al auter, et puis les feffees font feffment del terre al use del devisor et puis le statut le devisor morust, le terre passera per le devise, car apres le feffment le devisor avoit mesme l'use que il avoit devant.*"

The case then appears to be this. The *cestui que use* made his will, and the feoffees afterwards made a feoffment of the lands to his *use* ; that is, enfeoffed other persons to the use of him. This appears by the reason given for the decision, namely, "because after the feoffment the devisor had the same use which he had before." Whereas, if the facts of the case were as Lord Rosslyn supposed, the devisor would, before the feoffment, have been a mere *cestui que use*, entitled at law to neither *jus in re*, nor *jus ad rem* ; and after the feoffment he would have been actually clothed with the legal seisin of the estate ; the case, therefore, seems only a decision, that where a man devises an equitable estate, a transfer of the legal estate to other persons, in trust for him, is not a revocation of his will. And such is still the rule of law (Doe v. Pott, Dougl. 2d edit. 710.) as well as of equity, Jenkinson v. Watt, Lofft, 609.

It may, however, be objected, that the devisor did not die till after the statute of uses ; and therefore admitting the force of the foregoing remarks, it still appears that the legal estate was, by the operation of the act, vested in the devisor. To this it may be answered, that the statute was expressly passed to prevent alienation of estates by devise, although it declared that wills made before the statute, by persons who were or should be dead before the 1st of May 1536, should not be invalidated by the act. We must therefore presume that the devisor died before that time ; otherwise the will would have been void by virtue of the act itself, as was expressly decided in a case where *cestui que use*

But in analogy to the decisions upon legal estates (*m*) it has been held, that a devise of a freehold estate contracted for, is revoked by a subsequent conveyance to the usual uses to bar dower (*n*), even where the contract was by parol (*o*), but it is difficult to say, in the latter case, that a conveyance to the usual uses to bar dower is not within the contract of the parties. If, however, it were stipulated in the contract that the estate should be conveyed to the purchaser in fee, or to such uses as he should appoint, a conveyance to uses to bar dower, would not, it is apprehended, operate as a revocation of the will.

Estates contracted for *after* the will, will not pass by it (*p*); nor will lands pass by the will, although conveyed to the purchaser subsequent to his will *in pursuance of a contract prior to the will*, unless it was a valid binding contract (*q*). But in these cases the heir at law will be entitled to the estate for his own benefit, and if not paid for, the purchase-money must be paid out of the personal estate of his ancestor (*r*), and that, although he unite in himself the three characters of vendor, heir, and executor (*s*). The estate will, however, be assets in the hands of the heir.

(*m*) See *Tickner v. Tickner*, 3 Atk. 742, cited; *Kenyon v. Sutton*, 2 Ves. jun. 600, cited; and *Nott v. Shirley*, *ibid.* 604, n.; and see 2 Ves. jun. 429, 600; 6 Ves. jun. 219; 8 Ves. jun. 115, 211; 10 Ves. jun. 249, 256. See also *Luther v. Kidby*, 3 P. Wms. 170, n. and observe the distinction.

(*n*) *Rawlins v. Burgis*, 2 Ves. & Bea. 382. There was an appeal to the Lord Chancellor, which was for particular reasons withdrawn. It is a point of great interest and nicety.

(*o*) *Ward v. Moore*, 4 Madd. 368.

(*p*) *Langford v. Pitt*, 2 P. Wms. 629; *Alleyn v. Alleyn*, Mose. 262; *Potter v. Potter*, 1 Ves. 437; and see 1 Atk. 573; *White v. White*, 2 Dick. 522; Reg. Lib. B. 1775, fol. 650.

(*q*) *Rose v. Cunynghame*, 11 Ves. jun. 550.

(*r*) *Milner v. Mills*, Mose. 123; and see 2 P. Wms. 632; 3 P. Wms. 224; *Broome v. Monck*, 10 Ves. jun. 597.

(*s*) *Coppin v. Coppin*, Sel. Cha. Ca. 28; 2 P. Wms. 291.

make a *general devise of all his lands*, and after the contract execute a codicil, according to the statute of frauds, unless an intention appear not to affect it (*a*), the after-purchased estate will pass under the devise in the will, although legacies only are given by the codicil, and no notice is taken of the estate (*b*).

It has been thought that this rule would not apply where the devise in the will is of “the estates of which I am *novo* seised;” but the codicil makes the will speak as from the date of the codicil, and therefore there seems to be no solid ground for the supposed distinction.

And if a purchaser, previously to a contract, by a will duly executed according to the statute, direct his after-purchased lands to be conveyed to the uses of his will, and make a provision for his heir at law, and afterwards die without republishing his will, and the after-purchased lands devolve on the heir at law, equity will put the heir to his election, and not permit him to take both the descended estate, and the provision made for him by the will (*c*). But to raise a case of election the words must be unequivocal; and therefore a direction to executors to sell whatever real estates the testator might die possessed of, was held not to mean after-purchased estates (*d*).

In purchasing, therefore, of an heir at law who claims an estate conveyed to his ancestor after the date of his will, the purchaser should be satisfied of three points: viz. 1st, That the contract was not entered into by the testator previously to making his will. 2dly, That no codicil was

(*a*) *Lady Strathmore v. Bowes*, 7 Term Rep. 482; 2 Bos. & Pull. 500.

(*b*) *Barnes v. Crowe*, 1 Ves. jun. 486; *Pigott v. Waller*, 7 Ves. jun. 98; *Goodtitle v. Meredith*, 2 Mau. & Selw. 5; *Hulme v.*

Heygate, 1 Mer. 285.

(*c*) *Thellusson v. Woodford*, MS. 13 Ves. jun. 209, affirmed in Dom. Proc.; and see *Treat. of Powers*, ch. 6, sect. 2, div. II.

(*d*) *Back v. Kett*, 1 Jac. 534.

If, however, an agreement be such as a court of equity will not carry into execution against the representatives, there seems ground to contend that it will not revoke the will, because the agreement can operate as a revocation in equity only; and, therefore, if equity will not sustain the agreement in respect of which the will is held to be revoked, there appears to be no solid reason why the devise of the estate should not take effect. In *Onions v. Tyrer*(i) the Lord Chancellor held, that a second will, devising lands to the same person as the former, and revoking all former wills, but not duly executed, should never revoke the former will so as to let in the heir; *nay, if by the latter will the premises in question had been given to a third person, it should never have let in the heir, in regard the meaning of the second will was to give the second devisee what it had taken from the first, without any consideration had to the heir; and if the second devisee took nothing, the first would have lost nothing.*

These principles ought, perhaps, to be referred to the words of the statute of frauds (k); but still as an agreement is only an equitable revocation, the same reasoning applies to the case before us. Where a man contracts for the sale of his estate he intends to increase his personal estate, and not to benefit his heir; and if the Court will not carry the agreement into a specific execution for the benefit of the personal estate, “the personal estate takes nothing, and the devisee can have lost nothing.”

In the two cases (l) in which it has been holden, that an agreement will revoke a will in equity, it makes a term of the proposition, that the agreement amounts in equity to a conveyance. And it should seem that Lord Eldon

(i) 1 P. Wms. 345. See 7 Ves.

(l) *Ryder v. Wager*, and *Cotter v. Layer*, *ubi sup.*

Pow. Dev. 641.

tor's death by the contract, of course no subsequent event can render the will operative and effectual (*p*). In the first case in the books (*q*), in which the question arose whether a covenant to convey an estate devised should operate at law as a revocation of the will, it was holden, that such a covenant without more, was not any revocation of the will; because perhaps the deviser's intention would alter before performance of the covenant. At law, therefore, a contract does not revoke the will; but a conveyance in pursuance of the contract would of course operate as a revocation, or to speak more technically, as an ademption. Now it may be contended, that the same rule must prevail in equity, and that a contract for sale ought not to affect the validity of a prior will, until it is carried into execution, or, which in equity is tantamount to a conveyance, until the Court decree a specific performance of it. While an agreement rests *in fieri*, and the validity of it has not been acknowledged by a decree, it seems equitable that the owner should be at liberty, with the concurrence of the other party, to alter his mind. Indeed in the absence of intention there seems to be no weighty distinction between an agreement which has been abandoned, and an agreement which equity will not perform. If a man make a second will without expressly revoking the first, and afterwards cancel the second will, the first is revived, the second will being considered only intentional (*r*); and although it is true that a will is ambulatory till the death of the testator, yet the same ground may be taken in support of a will impliedly revoked by an agreement afterwards abandoned. Why should not a mere agreement be deemed ambulatory till it is completed, when it is clear that the parties may rescind the agreement, and

(*p*) *Bennett v. Lord Tankerville*, 19 Ves. 170. Abr. 615, (P.) pl. 3.

(*r*) *Goodright v. Glazier*, 4 Burr.

(*q*) *Montague v. Jeffries*, 1 Ro. 2512.

choose to purchase the inheritance for 3,000*l.*, Whitmore would convey to him (1). In 1761, before any election, Whitmore died, and left all his real estate to Bennett in fee, and all his personal estate to Bennett and his sister equally. In 1765, before the time mentioned, Waller, who purchased the lease and benefit of the agreement from Douglas, called on Bennett to convey for 3,000*l.*; which conveyance was made in consideration of that sum. Afterwards the sister and her husband filed a bill against the representative of Bennett, claiming a moiety of the 3,000*l.* and interest, and it was decreed accordingly.

This case has been recently followed by Lord Eldon (y). But it must be observed, that until the option is declared, the rents belong to the heir or devisee.

Upon the same principle it has been determined, that if a man having a timber estate, agree to sell a given quantity per annum, to be chosen by the buyer, although the owner die, and the option is in the buyer, yet the timber cut after the owner's death, however large in quantity, will be part of his personal estate (z).

The rule established by these decisions must frequently subvert the vendor's intention; where, therefore, a vendor intends the estate, as between his real and personal representatives, to be deemed real estate, a declaration to that effect should be inserted in the agreement for sale.

Disputes also often arise between the real and personal representatives, where a person purchases an equity of redemption; the real representative mostly claiming to

(y) *Townley v. Bedwell*, 14 Ves. jun. 19.

(z) See 7 Ves. jun. 437.

(1) As to rights of pre-emption given by will, and the mode in which they will be carried into execution, see *Earl of Radnor v. Shafto*, 11 Ves. jun. 448; as to a right of pre-emption of timber, which a lessee is authorized to cut down, see *Goodtitle v. Saville*, 15 East, 87.

had been entered into (*b*), and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him (*c*). The Court cannot speculate upon what the deceased party would or would not have done ; but, in these cases, the inquiry must be, whether at his death a contract existed, by which he was bound, and which he would be compelled to perform. That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor, a right to call upon his heir. The question must be the same, whether a purchase or a sale is insisted on. Was the ancestor himself bound ? Was there such an agreement as converts the real estate into personal, or the personal estate into real ? (*d*) (I). On this ground it has been decided, that where a man had a right of pre-emption of an estate under a will, and did not accept the offer in his life-time, or denote any intention by his will to do so, there was no subsisting contract, by virtue of which the right passed to the real representative, so as to enable him to call upon the personal estate to pay for

(*b*) *Lacon v. Mertins*, 3 Atk. 1 ;
Attorney-general v. Day, 1 Ves.
 218 ; *Buckmaster v. Harrop*, 7
 Ves. jun. 341 ; and see 8 Ves. jun.
 274 ; *Rose v. Cunynghame*, 11
 Ves. jun. 550.

(*c*) *Green v. Smith*, 1 Atk. 573 ;
Broome v. Monck, 10 Ves. jun.
 597 ; *Savage v. Carrol*, 1 Ball &
 Beatty, 265. *Vide supra*.

(*d*) *Per Sir Wm. Grant*, 7 Ves.
 jun. 344, 345.

(I) *Vide supra*, p. 121. Note, in *Potter v. Potter*, 1 Ves. 438, a bill was filed to compel execution of the parol agreement in the testator's life-time ; his agent gave a note for payment of part of the purchase money, and *let the estate as he pleased*. Possession of the estate must therefore, have been delivered to him. And the Master of the Rolls expressly said, that the agreement was so far carried into execution, even before the will, as to supply the want of writing. This case, therefore, like the others, only proves, that a *binding* contract in the testator's life-time will be enforced.

not those of equity, must then prevail, and consequently neither the vendor nor his heir would be considered as a trustee for the purchaser, but would only be subject to an action for breach of contract.

SECTION II.

Of Specific Performance.

THE preceding observations lead us to inquire, in what cases a court of equity will decree a specific performance; which, for the purposes of this work, may be comprised under two heads. First, with respect to the vendor: Secondly, with respect to the agreement itself.

I. First, then, if a man, seised in fee-simple, or *per autre vie* (*h*), contract for the sale of his estate, and die before the conveyance is executed, his heir at law will be decreed to perform the agreement *in specie*, although he covenanted for himself only, and not for his heirs (*i*).

But, if the heir at law be an infant, he will not be deemed a trustee for the purchaser within the 7th Anne, c. 19 (I); because, it is said, the act does not extend to trusts raised by the construction of equity, and, consequently, no conveyance can be obtained until the infant attains twenty-one (*k*). On examination of the authori-

(*h*) *Stevens v. Baily*, 2 Freem. 199, cited; *Nels. Cha. Rep.* 106. reported; see *Anon.* 2 Freem. 155. Abr. 541, pl. 28; *Goodwin v. Lister*, 3 P. Wms. 387; S. C. MS.; *Hawkins v. Obéen*, 2 Ves. 559; *Fearne's Posthuma*, 236; *Jerdon v. Forster*, 1 Sand. on Uses, 283, cited, 3d edit. *Ex parte Janaway*, 7 Price, 679.

(*i*) *Gell v. Vermedum*, 2 Freem. 199.

(*k*) See *Ex parte Vernon*, 2 P. Wms. 549; *Sikes v. Lister*, 5 Vin.

(I) Repealed by the 6th Geo. IV. c. 74, which consolidates the acts with variations.

do convey ;” which proves that the decree is correctly stated in Dickens.

I have not been able to learn whether Lord Thurlow altered his opinion, or upon what ground the decree was varied ; but it seems to have been occasioned by the impossibility of obtaining a conveyance from the heir at law, who went to the East Indies very young, and had not been since heard of. The conveyance was not executed till many years after the decree, when the heir at law, if he was alive, must have been between thirty and forty years of age ; but he was supposed to be dead, and another person joined in the conveyance, as the heir at law of the vendor. The presumption, therefore, is, that Lord Thurlow continued of the same opinion, but varied the decree, for the convenience of the parties. For notwithstanding Lord Talbot’s doubt (*m*), it has been decided, that an infant may convey under the statute of Anne, in pursuance of a decree of the Court (*n*) ; and it is a simple act of legislation to declare, as Lord King is reported to have done, that he would in the case before him hold the statute to apply to constructive trusts, but that he never would do so in future (*o*). If the Court were, in cases of this nature, to require a bill to be filed, the interests of the infant would be before the Court, and could be taken care of (*I*).

(*m*) *Goodwin v. Lister*, 3 P.Wms. Pos. 239 ; and *Hawkins v. Obeen*, 387 ; S. C. MS. 2 Ves. 559.

(*n*) *Oneby v. Price*, *Fearne’s* (o) See *Goodwin v. Lister*.

(*I*) *Ex parte Knight*. *Lady Teynham v. Head*, 21 January 1799, Chan. Two daughters devisees in fee. The estate was sold under a decree for payment of testator’s specialty debts. The surviving daughter, and two sons, co-heirs in gavelkind of the other, were made conveying parties in the conveyance to the purchaser. One son died without having executed the conveyance, leaving an infant heir, who was decreed to be a trustee for the purchaser, and conveyed accordingly.

freeholds cannot be barred by a mere deed, but only by a fine or recovery, it seems that equity could not consider such issue to be bound by a mere agreement entered into by their ancestor.

The same observations seem to apply to legal and equitable estates tail in copyholds, for a legal entail can only be barred according to the custom of the manor of which the copyhold estate is holden; and perhaps the better opinion is, that the same steps must be taken to bar an equitable estate tail in copyholds, as must be pursued in the case of a legal entail. Lord Hardwicke, however, appears to have thought (*x*) that a mere surrender was in every case sufficient to bar an *equitable* estate tail in copyholds; but the contrary opinion is entertained by the Profession, and appears to be authorized by a case cited in several books from the papers of the late Mr. Powell(*y*), in which it was held, that a covenant by a tenant in tail in equity of a copyhold, in his marriage settlement, to surrender his copyholds to uses in strict settlement, was not of itself sufficient to dock the equitable entail; for if such an entail be created, a recovery in the court baron is necessary to dock it; *it being a rule, that the same steps must be taken to bar an equitable estate in tail, as would be requisite to bar it, were it a legal estate tail* (*z*), (I).

815; Boteler v. Allington, 1 Bro. C. C. 72; Burnaby v. Griffin, 3 Ves. jun. 266; and see Fletcher v. Tollet, 5 Ves. jun. 13.

(*x*) Radford v. Wilson, 3 Atk. 315; and see the judgment of Lord Chancellor Apsley, in Grayme v. Grayme, 1 Watk. Cop. 180; and

see Pow. Contr. 126. See Pullen v. Lord Middleton, 9 Mod. 483.

(*y*) Hale's case, Ch. 11th Dec. 1764; and see Roe v. Lowe, 1 Henry Blackst. 446.

(*z*) And see 1 Watk. Copyh. 181; 1 Preston on Convey. 155.

(I) Note; this appears to be an extract from Mr. Booth's opinion on this case. The case itself appears to have been decided on the ground that the remainder-man claiming in equity under the covenant for the settlement was a mere volunteer.

dispose of it as if she were sole; nor will an agreement by her husband bind her (*e*). Of the incapacity of a married woman, or her husband, to bind her real estate, unless by a fine or recovery, there is a striking instance in the year books in the reign of Edward the fourth (*f*). A woman *cestui que use* and her husband joined in the sale of her estate; the wife received the money, and she and her husband begged her feoffee to convey the estate to the purchaser, which he accordingly did. The husband died, and then the wife filed a bill against the feoffee for a breach of trust. The cause was heard in the Exchequer Chamber, before the Chancellor and the judges of both benches, who held, that the sale was in fact the sale of the husband; that the receipt of the money by the wife was immaterial, and the sale was void; that the trustee was answerable for the breach of trust; and as the purchaser knew he was buying a married woman's estate, that the wife might recover the estate from him.

If, however, a husband agree to convey his wife's estate, he will, according to some cases, be compelled to perform the agreement *in specie* (*g*); because it has been said, it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose (*h*); but this does not seem to be the true ground, for although the wife swear by her answer that she never assented to the agreement, yet the

(*e*) See *Daniel v. Adams*, Ambl. 495; 1 Eq. Ca. Abr. 62, pl. 2, side note, which correct the *dictum* in *Baker v. Child*, 2 Vern. 61; but see *Martin v. Mitchell*, 3 Swanst. 413. It was said by Murray, Solicitor-General, and agreed to by Lord Hardwicke, that there was no decree in *Baker v. Child*, in Reg. Lib., but it was referred to arbitration.

(*f*) 7 E. IV. 14, b.

(*g*) *Hall v. Hardy*, 3 P. Wms. 187; *Barrington v. Horne*, 2 Eq. Ca. Abr. 17, pl. 7; *Morris v. Stephenson*, 7 Ves. jun. 474. See *Wheeler v. Newton*, Prec. Cha. 16; *Haddon's case*, Toth. 205; and see *Griffin v. Taylor*, *ib.* 106, edit. 1649.

(*h*) *Winter v. Devreux*, 3 P. Wms. 190, n. (B.)

not to take his chance of damages against the husband? And after showing the absurdity which must arise by adhering to the contrary doctrine, his Lordship added, that there was difficulty enough to make him pause, before he should follow the two last authorities; and he was not sure, whether it was not proper to have the judgment of the House of Lords, to determine which of the decisions on this point ought to bind us.

And it now seems perfectly clear, that this jurisdiction is to be very sparingly exercised (I), and that equity will eagerly seize on any reasonable ground as a bar to the aid of the Court(n). Indeed in a late case (o) in the Court of Common Pleas, where an action was brought on a covenant by a husband, that he and his wife would levy a fine, and he could not procure her concurrence, the learned Chief Justice said, that the covenant upon which the action was brought was such as the Court of Chancery would not now enforce; and he added, that nothing could be more absurd than to allow a married woman to be compelled to levy a fine, through the fear of her husband being sued and thrown into gaol, when the general principle of the law is, that a married woman shall not be compelled to levy a fine. This observation of Lord Chief Justice Mansfield must have considerable influence on this subject, although, as we have seen, it is not settled that equity will, *in every case*, refuse to compel the husband to procure his wife's concurrence.

(n) See *Ortread v. Round*, 4 Vin. Abr. 203, pl. 4; *Emery v. Wase*, *ubi sup.*; *Daniel v. Adams*, Ambl. 495.

(o) *Davies v. Jones*, 1 New Rep. 267; and see *Martin v. Mitchell*, 3 Swanst. 425.

(I) Upon this expression Lord Eldon observes, that certainly it is very satisfactory to be informed, that it is and it is not to be done. 8 Vez. jun. 516.

agreement for sale of an estate ; and it will in this place, therefore, be sufficient to state the *general* rules by which equity is guided in compelling the specific performance of agreements.

The original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled ; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground the Court, in a variety of cases, has refused to interfere, where from the nature of the case the damages must necessarily be commensurate to the injury sustained (*s*), as, for instance, in agreements for the purchase of stock, it being the same thing to the party, where or from whom the stock is purchased, provided he receives the money that will purchase it. But the sale of an annuity payable out of dividends of a particular stock (*t*), or of the right to a dividend upon a bankrupt's estate (*u*), or even a contract for stock where the object is to obtain delivery of certificates which confer the legal title to it (*x*), may be enforced in equity. These cases show what were the grounds on which courts of equity first interfered, but they have constantly held that the party who comes into equity for a specific performance, must come with perfect propriety of conduct, otherwise they will leave him to his remedy at law (*y*).

The decreeing a specific performance is a matter of discretion, but it is not an arbitrary, capricious discretion; it

(*s*) Errington v. Annesley, 2 Bro. C. Ca. 341; Flint v. Brandon, 8 Ves. jun. 363; Mitf. Pl. 109.

(*t*) Withy v. Cottle, 1 Sim. & Stu. 174, affirmed upon the hearing.

(*u*) Adderley v. Dixon, 1 Sim. & Stu. 607.

(*x*) Doloret v. Rothschild, 1 Sim. & Stu. 590.

(*y*) Harnett v. Yielding, 2 Scho. & Lef. 553. [misprinted in the book] per Lord Redesdale; and see Cadman v. Horner, 18 Ves. jun. 10.

must be regulated upon grounds that will make it judicial (*z*). And undoubtedly every agreement, of which there should be a specific execution, ought to be in writing, certain, and fair in all its parts, and for adequate consideration (*a*).

Equity will not decree a specific performance of an agreement made in a state of intoxication, although the party was not drawn in to drink by the plaintiff; nor will it decree the agreement to be delivered up; but will leave the parties to their remedy at law (*b*).

If it be stipulated in a contract, that immediate possession shall be given to the purchaser, which is done, but in consequence of disputes as to the title, the seller afterwards turn the purchaser out of possession, he abandons his right to a specific performance (*c*).

A court of equity frequently decrees a specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be notwithstanding conscientious that that agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance; and to sustain an action at law, performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case (*d*).

Although damages may be recovered at law, yet equity is not therefore obliged to decree a specific performance;

(*z*) *Per* Lord Eldon, see 7 Ves. jun. 35; and see 1 Atk. 183; 4 Burr. 2539.

(*a*) *Per* Lord Hardwicke, see 1 Ves. 279; and see 3 Atk. 386; Ellard v. Lord Landaff, 1 Ball & Beatty, 241; Martin v. Mitchell, 3 Swanst. 413.

(*b*) Cragg v. Holme, 18 Ves. jun. 14, cited. See Say v. Barwick, 1 Ves. & Bea. 95.

(*c*) Knatchbull v. Grueber, 3 Mer. 124.

(*d*) Davis v. Hone, 2 Scho. & Lef. 341, 748. See Lennon v. Napper, *ibid.* 684.

but the Court will judge on the whole circumstances of the case, whether it be such an agreement as ought to be carried into effect; for a jury, upon inquiry, may find very small damages, and then it would be very hard to carry such an agreement into execution in equity, when it would be greatly to the prejudice of the party against whom it should be decreed to be executed (*e*).

In a case where a man was entitled to a small estate under his father's will, given on condition that if he should sell it in twenty-five years, half the purchase-money should go to his brother; he agreed, in writing, to sell it, and afterwards refused to carry the sale into execution, pretending to have been intoxicated at the time. A bill was brought against him to compel a specific performance; and Lord Hardwicke held, that without the other circumstance, the hardship alone of losing half the purchase money, if carried into execution, was sufficient to determine the discretion of the Court not to interfere, but leave them to law (*f*).

Nor will equity interpose, if the party who is called upon to do the act is not lawfully competent to do it; for that, amongst other inconveniences, would expose him to a new action for damages (*g*).

But although a covenant ought not to be performed literally, yet equity will execute it according to a conscientious modification of it, to do justice as far as circumstances will permit (*h*).

Suppressio veri, as well as *suggestio falsi*, is a ground to rescind an agreement, or at least not to carry it into

(*e*) *Per* Lord Hardwicke, MS. See *Pope v. Harris*, Lofft, 791, cited; *White's case*, 3 Swanst. 108, n.

(*f*) *Fain v. Brown*, 2 Ves. 307, cited; *Costigan v. Hastler*, 2 Scho. & Lef. 160. See 2 Ball & Beatty,

283; *Howell v. George*, 1 Madd. 1.

(*g*) *Harnett v. Yielding*, 2 Scho. & Lef. 554; *Ellard v. Lord Llandaff*, 1 Ball & Beatty, 241. See *post*, p. 199.

(*h*) *Davis v. Hone*, 2 Scho. & Lef. 348.

execution (*i*), and even an industrious concealment, during a treaty, of the necessary repair of a wall to protect the estate from a river, which was a considerable outgoing, has been deemed a sufficient ground to withhold the aid of equity from a vendor (*k*). So where there is a mistake between the parties as to what was sold, the Court will not interfere in favour of either party (*l*). Even mere surprise on third persons at a sale by auction, has been deemed sufficient to prevent the Court from assisting a purchaser, as where the known agent of the seller bid for the estate on behalf of the purchaser, and other persons present thinking he was bidding as a puffer on the part of the vendor were deterred from bidding (*m*). So, in a recent case, where a purchaser, previously to the sale by auction, told the vendor that he would have nothing to do with the estate, but afterwards went to the sale, *where he was considered by the company as a puffer* (*l*), and bid 8,000 *l.* for the estate, which was knocked down to him at that sum from the misapprehension of the person appointed to bid for the vendor, who ought to have bid 9,000 *l.*, and the mistake was instantly explained, a specific performance was refused (*n*).

If an agent, employed to sell an estate, sells it in a man-

(*i*) See *Buxton v. Cooper*, 3 Atk. 383; S. C. MS.; *Howard v. Hopkins*, 2 Atk. 371; *Young v. Clerk*, Prec. Cha. 138; 1 Trea. Eq. ch. ii. s. 8; 1 Ball & Beatty, 241; *Lord Clermont v. Tasburgh*, 1 Jac. & Walk. 112.

(*k*) *Shirley v. Stratton*, 1 Bro. C. C. 410.

(*l*) See 1 Ves. jun. 211; 6 Ves. jun. 339; 13 Ves. jun. 427; *Higginson v. Clowes*, 15 Ves. jun.

156; *Clowes v. Higginson*, 1 Ves. & Bea. 524; *Harnett v. Yielding*, 2 Scho. & Lef. 554.

(*m*) *Twining v. Morris*, 2 Bro. C. C. 326. See 6 Ves. jun. 338; 10 Ves. jun. 305, 313, 398; and see *Willan v. Willan*, 16 Ves. jun. 72; *Magrave v. Archbold*, 1 Dow, 107.

(*n*) *Mason v. Armitage*, 13 Ves. jun. 25. See *Hill v. Buckley*, 17 Ves. jun. 394.

(*l*) This is stated in the judgment, but *qu.* whether it appeared in evidence.

ner not authorized by the authority given to him, a specific performance will not be decreed against the principal although the estate be sold for a greater price than he required for it (*o*). At least, it is clearly settled, that if an agent is empowered to sell an estate by public auction, a sale by private contract is not within his authority. For although the owner may have fixed the price, yet the estate might have sold for more at a public auction. But if an agent is directed to sell an estate by private contract, and he dispose of it by public auction for a larger sum than the principal required, it still seems open to contend that the purchaser may enforce a specific performance of the contract, unless some particular reason should occur to induce the Court to refuse its aid.

In *Mortlock v. Buller* (*p*), Lord Eldon said he should hesitate long before he should state as a clear proposition, that where the title to a specific performance is founded in a gross breach of trust by an agent to his principal, a court of equity would assist the plaintiff in the purpose of availing himself of that breach of trust; and whether the principle would not authorize the Court to leave him to law, and not to let him come for a remedy beyond that. There were, his Lordship added, *dicta* enough well to authorize that.

And where trustees for sale of an estate enter into a contract, which would be deemed a breach of trust, equity will not only refuse to interfere in favour of the purchaser, but will even at the suit of the *cestuis que trust* restrain the trustees from executing the contract, and the purchaser will be left to his remedy at law (*q*).

(*o*) *Daniel v. Adams*, *Ambl.* 495; *et vide a dictum* by Lord Eldon in *Coles v. Trecothick*, 1 *Smith's Rep.* 247.

(*p*) 10 *Ves. jun.* 292; and see the close of the judgment, *Ord*

v. Noel, 5 *Madd.* 438.

(*q*) *Mortlock v. Buller*, 10 *Ves. jun.* 292. See *Hill v. Buckley*, 17 *Ves. jun.* 394; *Bridger v. Rice*, 1 *Jac. & Walk.* 74.

If a person, entitled in default of execution of a power of sale, contract to sell the estate, not as owner, but merely as the agent of the trustees, and the contract could not, under the circumstances, have been carried into execution against the trustees, it will not be enforced against the agent, although he himself become entitled to the estate before the decree (*r*), (I).

Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor has it in his power by the ordinary course of law or equity to make himself so; though the owner offer to make the seller a title, yet equity will not force the buyer to take it, for every seller ought to be a *bonâ fide* contractor (*s*): and it would lead to infinite mischief if one man were permitted to speculate upon the sale of another's estate. Besides, the remedy is not mutual, which perhaps is of itself a sufficient objection in a case of this nature. In *Armiger v. Clarke* (*t*), a tenant for life contracted to sell the inheritance; after his death, his son, who was entitled to the estate in remainder, and was not bound by his father's

(*r*) *Mortlock v. Buller*, 10 Ves. jan. 292.

(*s*) *Tendring v. London*, 2 Eq. Ca. Abr. 680, pl. 9. See 10 Ves. jun. 315; and 1 Jac. & Walk. 421; and *query*, whether there is any case, in which a man, knowing

himself not to have any title, has been allowed to enforce the contract by procuring a title before the report.

(*t*) *Bunb.* 111; see *post*, ch. 6; *Hamilton v. Grant*, 3 Dow, 33.

(I) From the papers in this cause, it seems that Mr. Buller treated with Mr. Mortlock as the owner of the estate, and this appeared from the receipt for the purchase-money, where the estate was called, "the property of John Buller, Esq." and Mr. Mortlock had not any knowledge whatever that the estate was in settlement. See *Lawrenson v. Butler*, 1 Scho. & Lef. 13.

Since this note was written, an action brought by Mr. Mortlock against Mr. Buller, for breach of contract, came on for trial, when it was compromised on terms very advantageous to the plaintiff. See 2 Ball & Beatty, 60; and see 2 Dow, 518.

covenant, brought a bill for a specific performance against the purchaser, and it was dismissed chiefly upon this principle, that the remedy was not mutual. And in *Noel v. Hoy* (*u*), it was said, that if *A.* sells *B.*'s estate, although *B.* is willing to confirm the contract, *A.* cannot enforce it: there is no mutuality. But in *Williams v. Carter* (*x*), the estate was sold, and it was afterwards discovered that it was bound by marriage articles, which it was decided in a suit instituted for the purpose, authorized the introduction of a power of sale in the trustees, and thereupon a bill was filed by them and the seller for a specific performance. The Vice-Chancellor overruled the objection, that there was no mutuality in the agreement, and decreed a specific performance.

And on the other hand, where a *bonâ fide* vendor has not a title to the estate, the Court will not, in favour of the purchaser, decree an impossibility, but will leave the purchaser to his remedy at law upon the articles (*y*); and, although he must necessarily obtain a verdict, if he have recourse to law, yet he would obtain nominal damages only (*z*), for a purchaser is not entitled to any compensation for the fancied goodness of his bargain, which he may suppose he has lost.

But where the purchaser is willing to take the title, such as it is, it is apprehended that he may do so. In a late case (*a*), Lord Redesdale said, that the plaintiff in equity must show that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for, if he does, a consequence

(*u*) V. C. 23 Feb. 1820, MS.

(*x*) MS. V. C. 1821.

(*y*) *Crop v. Norton*, 2 Atk. 74; 9 Mod. 233; *Cornwall v. Williams*, Colles, P. C. 390; *Benet College v. Carey*, 3 Bro. C. C. 390.

(*z*) *Fleureau v. Thornhill*, 2 Blackst. 1078; and see 3 Bos. & Pull. 167. See *Brig's case*, Palm. 364. *Vide post*.

(*a*) *Harnett v. Yielding*, 2 Scho. & Lef. 549. See *post*.

is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do more complete justice. If a party is compelled to do an act which he is not lawfully authorized to do, he is exposed to a new action for damages, at the suit of the person injured by such act; and, therefore, if a bill is filed for a specific performance of an agreement made by a man who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such a title as he can give, and that only in case where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give. His Lordship took the reason to be this, among others, not only that it is laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is by possibility injuring a third person, by creating a title with which he may have to contend.

It is, however, the received opinion, that the purchaser may elect to take the title, such as it is, although no injury would be sustained by him in case the agreement were not executed, nor does the rule seem to lead to the difficulty which has been apprehended; for, in such a case, the covenants must, of course, be so framed, as not to leave the seller exposed to an action on account of the flaw in the title; but where the conveyance would be merely void, and might embarrass persons claiming under the same title as the seller, equity seems to refuse its aid on substantial grounds (*b*).

But where a tenant for life with a power of sale, first settling other estates of equal or better value, sold the estate under an apprehension that he had power to convey

(*b*) See *Ellard v. Lord Llandaff*, 1 Ball & Beatty, 244. See *O'Rourke v. Percival*, 2 Ball & Beatty, 56.

the fee, the Court refused to compel him to settle another estate, in order to enable him to complete his contract (c).

To enable the Court to decree a specific performance against a vendor, it is not, however, necessary that he should have the legal estate ; for if he has an equitable title, a performance in specie will be decreed (d), and he must obtain the concurrence of the persons seised of the legal estate.

Although, as we have seen, a vendor cannot demand the aid of equity, unless he is a *bonâ fide* contractor, yet the circumstance that the purchaser is a nominal contractor, and purchases in trust for another person, is immaterial ; for it happens, in a vast proportion of cases, that the contract is entered into in the name of a trustee (e), and the mere fact of a quarrel having taken place between the vendor and the real purchaser, totally unconnected with the subject of the contract (f), or even a bare refusal by the vendor to deal with the real contractor (g), is not a sufficient ground to refuse a performance in specie of the agreement.

But if a person apply to purchase an estate, and the vendor expressly refuse to treat with him, unless the money is paid down, which he is unable to do, but procures some other person to purchase the estate on his account, it seems clear, that at least the time appointed for payment of the money will be deemed of the very essence of the contract (h). So if a person apply to pur-

(c) *Howell v. George*, 1 Madd. 1.

(d) *Crop v. Norton*, 2 Atk. 74.

See *Costigan v. Hastler*, 2 Scho. & Lef. 160.

(e) *Hall v. Warren*, 9 Ves. jun. 605. (f) S. C.

(g) *Lord Irnham v. Child*, 1 Bro. C. C. 92.

(h) *Popham v. Eyre*, Lofft, 786.

Mr. Brown's note of this case evinces the danger of relying on short notes of cases ; see 1 Bro. C. C. 95, n. See *O'Herlihy v. Hedges*, 1 Schoales & Lefroy's Rep. 123 ; but note, that case was between *landlord and tenant* ; and see *Featherstonhaugh v. Fenwick*, 17 Ves. jun. 298.

executors, pretending that he had a commission from a friend or relation of Peele's, who lived in the country, to buy the house at any price, and he accordingly obtained a conveyance of it to a person nominated by him under a secret trust for himself. Garrick filed a bill against him, and the purchase was decreed fraudulent, and set aside with costs.

An agreement for the sale of an annuity for three lives, to be named by the purchaser, and to commence immediately, will be decreed, although the lives have not been named, if the delay has been occasioned by the seller (*l*).

In some cases (*m*), it has been holden, that where no action at law will lie to recover damages, equity will not execute the agreement in *specie*; for equity will never make that a good agreement, which is not so by law; but, in other cases (*n*), the contrary has been holden, and relief been given accordingly.

Perhaps the following distinctions are authorized by the cases, and will reconcile them.

First, That although the agreement be void at law, yet a specific performance will be decreed, if there is a clear ground for the interference of equity, according to the general rules of the Court; and, however unqualifiedly the contrary rule may have been laid down, there is not (that I am aware of) any case clearly entitled to the aid

(*l*) *Pritchard v. Ovey*, 1 Jac. & Walk. 396.

(*m*) *The Marquis of Normanby v. Duke of Devonshire*, 2 Freem. 216; *Dr. Betesworth v. Dean and Chapter of St. Paul's*, Sel. Cha. Ca. 66; and see 2 Eq. Ca. Abr. 15, 23, *notis*; and Fonbl. n. (*c*) to 1 Trea. Eq. 138, and n. (*h*) to p. 204, *ibid*.

(*n*) *Winged v. Lefebury*, 2 Eq. Ca. Abr. 32, pl. 43; *Acton v. Pierce*, 2 Vern. 480; *Cannel v. Buckle*, 2 P. Wms. 243; *Norton v. Mascall*, 2 Vern. 24; and *Hall v. Hardy*, 3 P. Wms. 187. See *East India Company v. Donald*, 9 Ves. jun. 275; 1 Smith's Rep. 213.

equity interposes and relieves against the abuse, or allays the rigour of the law.

The case of the Marquis of Normanby *v.* the Duke of Devonshire, was, I believe, the first in which this point occurred ; and, according to a manuscript note, it appears that Lord Somers called in the two chief justices on the point, whether the party, on the letters which had passed, could have recovered damages at law ? They were of opinion that he could not, and Lord Somers accordingly dismissed the bill.

So there are very few cases in which a court of equity can decree a performance of an agreement upon which there can be no action at law, *according to the words of the articles, and the events that have happened* (q).

A proviso, in a contract for sale, that if either party break the agreement he shall pay a sum of money to the other, will only be considered in the nature of a penalty (r) ; and consequently a specific performance will be decreed just as if no such proviso had been inserted. The defendant will not be allowed to forfeit the penalty, and get rid of the agreement (s).

Where an action is brought for the recovery of the penalty, to entitle the party bringing it to recover, he ought punctually, exactly, and literally, to have completed his part (t). And, it has been said, that if, for breach of an agreement, to which a penalty was annexed, either party recover damages at law beyond the penalty, equity will relieve against the verdict, on payment of the penalty

(q) *Whitmel v. Farrel*, 1 Ves. 256.

(r) *Howard v. Hopkins*, 2 Atk. 371. See 2 Scho. & Lef. 684 ; and *Magrave v. Archbold*, 1 Dow, 107 ; *Davies v. Penton*, 6 Barn. & Cress. 216.

(s) *Hopson v. Trevor*, 1 Str. 533 ; 2 P. Wms. 191 ; *Parks v. Wilson*, 10 Mod. 515.

(t) *Duke of St. Alban's v. Shore*, 1 H. Blackst. 270.

only (*u*) ; but this does not appear to be well founded, for, if the party have two remedies at law, one for breach of contract upon the covenant, or agreement, *toties quoties* ; the other for the penalty at once (*x*), there appears to be no pretence for equity to relieve ; although where large damages have been recovered at law, under a covenant which it was unconscientious strictly to enforce, the party may be relieved in equity, upon offering to perform the covenant according to conscience : but even this seems, in some measure, to be usurping the province of a jury, and the equity is administered with great caution.

Where the parties have expressly stipulated, that in case of a breach by either, he shall pay a sum named as *liquidated damages*, the whole sum may, if the agreement be broken, be recovered at law (*y*).

SECTION III.

Of the Remedies for a Breach of Contract.

IF either the vendor or vendee refuse to perform the contract, the other may bring an action for breach of contract, or file a bill for a specific performance (*z*) ; although it appears to have been formerly thought that as a vendor only wants the purchase-money, his remedy was at law (*a*).

Where one party fails in performing the contract, the other, if he means to rescind the contract, should give a clear notice of his intention (*b*).

(*x*) *Shenton v. Jordan*, Bunb. 132; but the reporter adds a query, for this seems an extraordinary opinion.

(*z*) See *Harrison v. Wright*, 13 East, 343.

(*y*) *Reilly v. Jones*, 1 Bing. 302.

(*z*) *Lewis v. Lord Lechmere*, 10 Mod. 503.

(*a*) See *Armiger v. Clark*, Bunb. 111; *Withy v. Cottle*, 1 Sim. & Stu. 174. See *Kenney v. Wenham*, 6 Madd. 385.

(*b*) *Reynolds v. Nelson*, 6 Madd. 18.

If a bill be filed for a specific performance, the Court will enjoin either party not to do any act to the injury of the other. Therefore, if the purchaser is in possession, and has not paid the money, the Court will grant an injunction against his cutting timber (*c*); so, on the other hand, the vendor will be restrained from conveying away the legal estate in the property; because such a measure might put the purchaser to the expense of making another party to the suit (*d*); and, *à fortiori*, he will be restrained from selling the estate to a third person (*e*). But in *Spiller v. Spiller* (*f*), the Lord Chancellor expressly laid it down, that upon a bill filed for a specific performance, he wished it to be understood, that the Court would not take from a seller the disposition of his property. So injunctions may be granted against the agents of the parties. But an injunction will not be granted against a person who is not a party to the suit; and, in a late case, in which, upon a bill filed by a seller for a specific performance, and an injunction against the purchaser's proceeding at law to recover the deposit from the seller's attorney, to whom it was paid, Sir John Leach, V. C. refused the motion, with costs, because the attorney was not a party to the suit (*g*).

But in a very recent case, the same Judge granted an injunction to restrain the purchaser from proceeding in an action against the auctioneer, although he (the auctioneer) was not a party to the suit; the seller offering to bring the deposit into Court.

In all cases where a bill in equity is filed for a specific performance, either party may in general, if he please, have a reference as to the title. The vendor is entitled to this

(*c*) *Crockford v. Alexander*, 15 Ves. jun. 138. (*f*) 30 June 1819, MS. S.C.

(*d*) *Echliff v. Baldwin*, 1 Ves. jun. 267. 3 Swanst. 556.

(*e*) *Curtis v. Marquis of Buck-* (*g*) *Brown v. Frost*, E. T. 1818.
ingham, 3 Ves. & Beam. 168. MS.

privilege in order to enable him to make out a title before a Master. The purchaser is allowed this right, in order that he may have the title assured in a manner he otherwise could not. As to a purchaser, the Court never acts upon the fact, that a satisfactory abstract was delivered, unless the party has clearly bound himself to accept the title upon the abstract; but though the abstract is in the hands of the party who says he cannot object to it, yet he may insist upon a reference; because, by the production of papers, which can be enforced, and by the examinations and inquiries which can be made by virtue of the decree, the title may be examined in a manner it never could upon a mere abstract (*h*). Either party may, however, wave this right.

Where a man makes a purchase of an estate, to which the vendor represents that he has a good title, in such a case the purchaser has a right to insist, that the question whether he have or have not a good title shall be sifted to the bottom before he can be called upon to adopt either alternative, and before the vendor can be let off from his original contract (*i*).

Where the purchaser files the bill, and insists that the vendor *cannot* make a good title, equity can only dismiss the bill with costs, although the court will compel him to make out the title if he have the ability (*k*). But the Court has power in a suit so framed to decide whether the title is good or bad.

If, after the confirmation of a report in favour of a title, a new fact appear, by which the title is affected, the title will be referred back to the Master (*l*). In a case where the seller of a leasehold estate produced the leasehold title, which the Master thought sufficient, and reported accord-

(*h*) See Lord Eldon's judgment in *Jenkins v. Hiles*, 6 Ves. jun. 653.

(*i*) 3 Mer. 137, *per* Lord Eldon.

(*k*) *Nicloson v. Wordsworth*, 2 Swanst. 365.

(*l*) *Jeudwine v. Alcock*, 1 Mad.

597.

ingly ; but the Court held, that the lessor's title ought to have been produced, and sent it back to the Master to review his report ; the seller had liberty given to him to produce the freehold title. And it was considered that the purchaser was at liberty to enter into objections to the leasehold title, which were not taken upon the former discussions before the Master (*m*). And, upon the objections being afterwards taken, the bill was dismissed (*n*).

So where it appears at the hearing upon the exceptions, that the seller can clear up the objection, the Court has sometimes sent the title back to the Master to review his report, and in such a case it is not necessary, as it was held by Lord Eldon, that the Master should have liberty to receive further evidence. He may receive such evidence without any express authority. In the case of *Esdaile v. Stephenson* (*o*), it appeared that the estate was subject to a rent-charge, and a term to secure it ; and the purchaser's counsel, before the Master, required the seller to produce a release of it, or evidence that the jointress would release ; but although he did not do so, the Master reported, that the seller could make a good title upon the jointress releasing. To this report exceptions were taken. The Vice-Chancellor consulted the Lord Chancellor, and stated their opinion to be, that the report was wrong. It should have been, that the seller could not make a good title unless the jointress joined ; and the Vice-Chancellor recommended in future, the form of such a report to be, that the seller could *not* make a good title, because *A.* is a jointress, and no sufficient evidence has been produced to show that she will release. The Lord Chancellor and the Vice-Chancellor agreed,

(*m*) *Fildes v. Hooker*, 2 Mer. 424.

(*n*) S. C. V. C. 3d April 1818, MS ; 3 Madd. 193.

(*o*) V. C. 8 Aug. 1822. MS. S. C. 6 Madd. 366 ; *Paton v. Rogers*, 6 Madd. 256.

the seller, he would report in favour of the title. If a suit should be necessary to try their equity, he would report against it.

A purchaser may file a bill for a specific performance, although it appears by the abstract that the vendor has no title, and yet unless he chooses to take the title, the Court cannot force it upon him, on the ground of his having filed the bill with a knowledge of the objection (*r*).

Where objections are made by a purchaser, evidently with a view to gain time, the Court itself will enter into the consideration of the objections, without referring the title to a Master. So where a bill is filed by a purchaser, the vendor, the defendant, has been allowed, after answer, and before the hearing of the cause, to move, that an inquiry may be directed as to the title, and at what time the abstract was delivered, and whether it was sufficient. This was allowed, in order to enable the Court to dispose of the cause with despatch (*s*). Again, where a vendor files a bill for a specific performance, and the purchaser submitted to perform the contract if a good title could be made, asserting that upon the abstract a good title could not be made, it was, upon the motion of the plaintiff, referred to the Master to inquire whether a good title could be made, and whether it appeared upon the abstract that a good title could be made (*t*). Lord Eldon has observed, that some degree of irritation was excited in the Court by persons called land-jobbers, contracting for estates without any intention of paying for them, and setting up defects of title, merely with the view of gaining time to dispose of them ; and, on that ground, Lord Rosslyn was prevailed upon to direct a reference of the

(*r*) *Stapylton v. Scott*, 16 Ves. jun. 272.

(*s*) *Moss v. Matthews*, 3 Ves. jun. 279.

(*t*) *Wright v. Bond*, 11 Ves. jun. 39.

the part of the plaintiff, as a ground for his not being compelled to perform the agreement, the Court will decide the question raised, before the title is referred to the Master (*b*).

Until lately, it was not the general practice, to make an inquiry, *ab ante*, at what time the plaintiff could make a title (*c*). If, upon the usual reference to the Master, to inquire whether the seller could make a good title, he reported in the affirmative, it might, with a view to costs, have been referred back to the Master, to inquire whether a good title could have been made at the filing of the bill; and if not, when it was that a good title could be made (*d*); and this reference might be made as well after a decree, as after an interlocutory order. The Vice-Chancellor (Sir John Leach) considered, that great additional expense and delay were occasioned by parties not asking, in the first instance, where the circumstances of the case made it material, that if the Master should find that a good title could be made, then that he might inquire when such good title was first shown to the purchaser (*e*). In a later case of *Harrington v. Secretan*, where the purchaser moved for a second order, the learned Judge, under the circumstances, granted the motion; but made a general rule, which he has since regularly followed, that the first reference should be to see whether a good title can be made, and if so, at *the request of either party*, to inquire when the seller showed a title. This rule appears to be entirely free from objection.

When the title is referred to the Master upon motion, and the report is against the title, the defendant may

(*b*) See *Blyth v. Elmherst*, *ubi sup.* *Skelton's case*, 1 Ves. & Bea. 517; *Wallinger v. Hilbert*, 1 Mer. 104; *Lowe v. Manners*, 1 Mer. 19; *Portman v. Mill*, 2 Russ. 570.

(*c*) *Gibson v. Clarke*, 2 Ves. & Bea. 103. See *Jennings v. Hopton*,

1 Madd. 211; and see *Lubin v. Lightbody*, 8 Price, 606.

(*d*) *Daly v. Osborne*, 1 Mer. 382; *Birch v. Haynes*, 2 Mer. 444.

(*e*) *Hyde v. Wroughton*, 3 Madd. 279. See *Anon.* 3 Madd. 405.

could be immediately made good (*n*)—where the purchaser had a sort of mixed possession with the vendor, and had paid part of the purchase-money, was insolvent, and had attempted without effect to sell the estate (*o*)—where the purchaser approved of the title and prepared a conveyance, and then raised objections (*p*)—where the purchaser had been guilty of laches, and cut underwood (*q*). Even in a case where it appeared on the face of the abstract that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser (*r*). So where from circumstances an acceptance of the title was inferred (*s*)—again, where a time was fixed for payment of the purchase-money by instalments, and the property was a *coal-mine* (*t*). In all these cases the rule has been applied, and if the estate be sold under a *decree*, the purchaser, if he enters into possession, will be compelled to pay his purchase-money into Court, unless he entered with the express consent of the *Court* (*u*).

But where the sale is not by the Court, and the seller has thought proper to put the purchaser into possession, with an understanding between them that he shall not pay his money until he has a title, the purchaser cannot

(*n*) *Gibson v. Clarke*, 1 Ves. & Beam. 500. See 1 Madd. 607.

(*o*) *Hall v. Jenkinson*, 2 Ves. & Beam. 125.

(*p*) *Watson v. Upton*, Coop. 92, n. But see *Bonner v. Johnston*, 1 Mer. 366; and see *Crutchley v. Jerningham*, 2 Mer. 502; *Fournier v. Edwards*, T. T. 1819, V. C. The deeds were executed, and an application was made for the completion of the purchase, but the purchaser had not the money. The motion was made upon the answer, by which the defendant

claimed compensation for some charges.

(*q*) *Burroughs v. Oakley*, 1 Mer. 52, 376; *Dixon v. Astley*, 1 Mer. 133, 378, n.; *Bradshaw v. Bradshaw*, 2 Mer. 492.

(*r*) *Brown v. Kelty*, L. I. Hall, July 1816, MS.

(*s*) *Boothby v. Walker*, 1 Madd. 197; and see *Smith v. Lloyd*, 1 Madd. 83.

(*t*) *Buck v. Lodge*, 18 Ves. jun. 450.

(*u*) *Anon.* L. I. Hall, 16 July 1816, MS.

Where a vendor files a bill for an injunction and a specific performance, the Court will, upon granting the injunction, put him upon proper terms, and therefore will in most cases order him to pay the deposit into court. But where the seller at the time of the bill filed is able and willing to make a good title to the estate sold, and the purchaser improperly refuses to complete the contract, although the seller is in possession of the estate, he will not be compelled to pay the deposit into court, because it is the fault of the purchaser and not of the seller that the latter retains both the deposit and the estate (*e*).

Although the defendant, by his answer, put in issue an objection to the title, and both parties examine witnesses to the point before the hearing, yet, upon a reference to the Master, both sides may produce further evidence before him (*f*).

If the seller has vested in him legally, or equitably, all the interest in the estate, it cannot be objected to the Master's report in favour of the title that the legal estate is outstanding, although in a lunatic, against whom no commission has issued. The vendor has the power, provided he will take the means necessary for the purpose of making a good title. If he neglect this, the question will properly arise when the Master comes to settle the conveyance (*g*).

Where an estate is sold in lots to different persons, the vendor cannot include them in one bill, for each party's case is distinct, and must depend upon its own peculiar circumstances, and there must be a distinct bill upon each contract (*h*). In demurring to a bill against distinct pur-

(*e*) *Wynne v. Griffith*, 1 Sim. & Stu. 147.

(*f*) *Vancouver v. Bliss*, 11 Ves. jun. 458.

(*g*) *Berkeley v. Dauh*, 16 Ves. jun. 380.

(*h*) *Rayner v. Julian*, 2 Dick. 677; *Brookes v. Lord Whitworth*, 1 Madd. 86.

chasers, as multifarious, the defendants need not deny combination (*i*), although that was formerly deemed essential (*k*).

If the purchaser's defence to a bill for a specific performance rest merely on the want of title in the vendor, he ought to depend on his answer, and not to file a cross-bill to have the agreement delivered up; because the vendor can make no use of the contract if he have no title (*l*). And a purchaser should not make the stewards or receivers of the vendor parties to his bill for a specific performance; for although, as we have already seen, the vendor is deemed a trustee for the purchaser, yet this rule does not extend to the agents of the vendor (*m*).

Where the plaintiff, in a bill for a specific performance, cannot prove his agreement, as laid; but the defendant, who proves the agreement to be different, offers to perform specifically the agreement which he represents; the Court will execute the agreement as proved by the answer, without a cross-bill, although the plaintiff should wish to have the bill dismissed (*n*), if the Court think the defendant entitled to a specific performance (*o*).

But, if a plaintiff insist upon a particular construction of a contract, and the Court decides against him, he will not be allowed a specific performance according to the construction against which he has contended. It is not like the case of a plaintiff calling upon the Court to construe and execute an agreement according to the true construction; suggesting that which he conceives to be so (*p*).

If a bill for a specific performance be dismissed, it

(*i*) *Brookes v. Whitworth*, 1 Mad. 36.

(*k*) *Bull v. Allen*, Bunb. 69.

(*l*) *Hilton v. Barrow*, 1 Ves. jun. 234.

(*m*) *Macnamara v. Williams*, 6 Ves. jun. 148.

(*n*) *Fife v. Clayton*, 13 Ves. jun. 546.

(*o*) *Higginson v. Clowes*, 15 Ves. jun. 516.

(*p*) *Clowes v. Higginson*, 1 Ves. & Beam. 524.

would require a clear and distinct case to be made out and prayed, to entitle the plaintiff to an account of rents, or the like (*q*).

If a purchaser have recourse to equity, and it appear that the vendor has, since the filing of the bill, sold the estate to another person, the Court will, it has been determined, refer it to a Master, to inquire what damage the purchaser has sustained ; and the sum which shall be found due, together with costs, will be directed to be paid to him (*r*). Equity, however, cannot give the purchaser any compensation where he files a bill to have the contract delivered up on account of the defective title of the vendor. But he will obtain a decree for delivering up of the contract, without prejudice to his remedy at law for breach of it (*s*).

In a recent case, upon a specific performance, where Lord Eldon refused to direct an issue or an inquiry before the Master, with a view to damages, his Lordship said, that the plaintiff must take that remedy, if he chooses it, at law. In *Denton v. Stewart*, the defendant had it in his power to perform the agreement, and put it out of his power pending the suit. The case, if it was not to be supported upon that distinction, was not according to the principles of the Court (*t*).

In a late case (*u*), where a seller had, after a contract for sale, sold at an advance to another person, the bill filed by the first purchaser prayed, that if the second purchaser bought without notice, the seller might account to

(*q*) *Williams v. Shaw*, 3 Russ. 178,
and *Stevens v. Guppy*, 3 Russ. 171.

(*r*) *Denton v. Stewart*, 1 Cox,
258 ; 1 Ves. jun. 329 ; 17 Ves. jun.
276, cited ; Reg. Lib. A. 1785,
fol. 552, 717 ; *supra*, p. 108, n. ;
Greenway v. Adams, 12 Ves. jun.
395.

(*s*) *Gwillim v. Stone*, 14 Ves.
jun. 128.

(*t*) *Todd v. Gee*, 17 Ves. jun.
273 ; *Blore v. Sutton*, 3 Mer.
237.

(*u*) *Daniels v. Davison*, 16 Ves.
jun. 249.

the plaintiff for the advanced price. It was not necessary to decide the point; but Lord Eldon observed, that the estate by the first contract, becoming the property of the vendee, the effect was that the vendor was seised as a trustee for him; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate of which he was so seised in trust, or should not be considered as selling it for the benefit of that person for whom, by the first agreement, he became trustee, and therefore liable to account. The ultimate decision was, that the first purchaser was entitled to a specific performance against the seller and the second purchaser, the latter being considered to take subject to the equity of the first purchaser, to have a conveyance of the estate at the price which he agreed to pay for it (*x*).

But where the contract has been executed, a bill cannot be filed simply for compensation, *e. g.* where the rental of the estate was represented higher than its actual amount (*y*).

It may here be observed, that if an exception taken to a report that a good title cannot be made, be overruled, the vendor should obtain an order for the exception to stand over; as, if disallowed, it would appear upon record that a good title could not be made (*z*).

If the abstract be not delivered in time, or objections arise to the title, the vendee may bring an action at law for non-performance of the agreement, in which case the vendor's remedy (if he can insist on the contract being specifically performed) is to file a bill for a specific performance, and an injunction to restrain the proceedings at law; and the vendor may file his bill for a performance *in specie*, although the vendee may have recovered his

(*x*) 17 Ves. jun. 433.

(*y*) *Newham v. May*, 10 Price, 117.

(*z*) See 1 Ves. jun. 567.

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deposit at law.

If an injunction be granted, the Court
will not dissolve it without the Master's report as to the
fact, where the action is brought on the ground of want

of title (a).

If a purchaser, upon a bill being filed for a specific
performance, pay the purchase-money without putting in
an answer, and afterwards discover that a fraud was com-
mitted in the sale, he is not precluded from bringing an
action for damages if he come recently after discovery of
the deception (b).

But if a defendant in a suit for a specific performance,
after a decree, bring an action at law against the plaintiff
in equity for damages, and the decree proceeded upon
the ground that he had waved the literal performance of
the thing, for breach of which the action is brought,
e.g. the time appointed for performance of the contract,
Equity will enjoin the action (c).

Where the purchaser has paid any part of the purchase
money, and the seller does not complete his engagement,
so that the contract is totally unexecuted, he, the pur-
chaser, may affirm the agreement, by bringing an action
for the non-performance of it, or he may elect to disaffirm
the agreement *ab initio*, and may bring an action for money
had and received to his use (d).

In this latter action, however, the plaintiff cannot re-
cover more than the money paid, although the estate has
risen in value ; while, on the other hand, it may perhaps
be thought, that if the estate has experienced a diminution
in value, he can only recover the damages he sustained
by the estate not being conveyed, that being the only

(a) Church v. Legeyt, 1 Pr. 301.

(b) Jeudwine v. Slade, 2 Esp.
Ca. 257.

(c) Reynolds v. Nelson, 6 Mad.
290.

(d) See 2 Burr. 1011 ; Farrer
v. Nightingale, 2 Esp. Ca. 639 ;
Hunt v. Silk, 5 East, 449 ; Squire
v. Tod, 1 Camp. N. P. 293. See
Levy v. Haw, 1 Taunt. 65.

money retained by the defendant against conscience ; and therefore the plaintiff, *ex æquo et bono*, ought not to recover any more (e).

The right to disaffirm the agreement is, in some cases, of great importance. If an agent enter into an agreement on behalf of his principal, but on the face of the agreement the agent appear to be the real purchaser, and is so considered by the vendor, yet if the purchaser actually pay the deposit, although through the medium of his agent, and the vendor do not complete his engagement, so that the contract is rescindable, the purchaser himself may maintain an action for recovery of the deposit, which will be considered as money received by the vendor to the use of the real purchaser (f).

But if a man enter into a contract expressly *as agent for a third person*, although really for his own benefit, and the other party has no notice that the supposed agent is the principal, the latter cannot maintain an action upon the contract without first disclosing to the other party that he is the principal (g).

Where a purchaser rests his action on a defect in the title, it is not sufficient to show that the title has been deemed insufficient by conveyancers, but he must prove the title bad (h).

If he succeed in proving the title bad, he will according to the counts upon which he recovers obtain a verdict either for his deposit, or for damages, which in most cases would be regulated by the amount of the deposit.

If he declare on the common money-counts, he of course

(e) See *Moses v. M'Farlan*, 2 Burr. 1005 ; *Dutch v. Warren*, id. 1010, cited ; and Str. 406 ; S.C. *Dale v. Sollet*, 4 Burr. 2133, *sed qd.*

(f) *Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337. See *Edden v.*

Read, 3 Campb. Ca. 338 ; *Bethune v. Farebrother*, 5 Mau. & Selw. 385, 391, cited.

(g) *Bickerton v. Burrell*, 5 Mau. & Sel. 383.

(h) *Camfield v. Gilbert*, 4 Esp. Ca. 221.

cannot obtain any damages for the loss of his bargain ; and even if he affirm the agreement by bringing an action for non-performance of it, he will obtain nominal damages only for the loss of his bargain (*i*), because a purchaser is not entitled to any compensation for the fancied goodness of his bargain which he may suppose he has lost, where the vendor is, without fraud, incapable of making a title.

And in a late case (*k*), where an auctioneer who had advanced some money on an estate, sold it by auction after the authority from his principal had expired, and the principal refused to confirm the sale, the Court of Common Pleas, in an action brought by the purchaser, in which he declared on the agreement, and for money had and received, &c. would not allow him damages for the loss of his bargain, although it was proved that the estate was worth nearly twice the sum which he gave for it.

But in a recent case (*l*), where a person who had contracted for the purchase of an estate, but had not obtained a conveyance of it, sold it by auction with a stipulation to make a good title by a day named, but which he was unable to do, as the vendor to him refused to convey, it was held, that the purchaser by auction might, beyond his expenses, recover damages for the loss which he sustained by not having the contract carried into effect. Lord Tenterden observed, that upon the present occasion he could only say, that if it is advanced as a general proposition, that where a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, he was by no means prepared to assent to it. If it were necessary to decide the point, he should desire to have time for consideration. But the circumstances of

(*i*) *Flureau v. Thornhill*, 2 Blaks. 1078 ; and see 3 Bos. & Pull. 167. MS. Appendix, No. 8.

See *Brig's case*, Palm. 364.

(*k*) *Bratt v. Ellis*, MS. Appen-

dix, No. 7 ; and see *Jones v. Dyke*, MS. Appendix, No. 8.

(*l*) *Hopkins v. Graysbrook*, 6 Barn. & Cress. 31.

this case showed that it differed very materially from that which had been quoted from Sir W. Blackstone's Reports. There the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase-money with interest ; here no such offer was or could be made. The defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer *some* title, and having entered into a contract to sell, without the power to confer even the shadow of a title, he must be responsible for the damage sustained by a breach of his contract. Mr. Justice Bayley said, that the case of *Flureau v. Thornhill* is very different from this, for here the vendor had nothing but an equitable title. Now where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title, and if he holds out as his own that which is not so, he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted.

This case is one of great importance, and will, I fear, tend to much litigation before the distinction which it introduces is thoroughly understood.

In a case of this nature a purchaser is not entitled to any compensation, although he may be a loser by having sold out of the funds, which may have arisen in the mean time, because he had a chance of gaining as well as losing by a fluctuation of the price (*m*).

But a purchaser is entitled to interest on his deposit (*n*) ; and if the residue of the purchase-money has been lying ready without interest being made by it, he is entitled to

(*m*) *Flureau v. Thornhill*, 2 Blackst. 1078.

(*n*) See ch. 10, *infra*.

interest on that (*o*). Where the plaintiff recovers under a special count on the original contract, which, we have seen, affirms the agreement, interest will be given as part of the damages for non-performance of the agreement: where he recovers under a count for money had and received, which disaffirms the contract, and to which is mostly added a count for interest, it may, it should seem, be recovered as damages sustained by the plaintiff, by reason of the money having been withheld from him. If, however, the original contract is void, as, if it be a parol agreement for the sale of lands, the purchaser, it seems, can only recover his deposit in an action for money had and received, and will not be allowed interest (*p*).

Where the plaintiff declares on the original contract, and lays the expenses incurred in investigating the title, &c. as special damages, he will be entitled to recover them as such (*q*). In one case Lord Ellenborough threw out a doubt upon this (*r*); but in a subsequent case before his Lordship, in which Gibbs, C. J., then at the bar, was counsel for the vendor, the defendant, a purchaser, obtained a verdict for his deposit with interest, and the *expenses of investigating the title*, without argument, it being admitted that the title was defective (*s*): in a still later case, they were also recovered by a purchaser (*t*); and there are other cases not reported, in which I am told such expenses have been recovered. If the rule were other-

(*o*) *Flureau v. Thornhill*, *ubi sup.*

(*p*) *Walker v. Constable*, 1 Bos. & Pull. 306. In this case, however, the rule was laid down generally, that interest could not be recovered in an action for money had and received; and see *Tapenden v. Randall*, 2 Bos. & Pull. 472, *sed qu.*; and see ch. 10, *infra*.

(*q*) *Flureau v. Thornhill*, *ubi*

sup.; *Richards v. Barton*, 1 Esp. Ca. 268; *Bratt v. Ellis*, *Jones v. Dyke*, App. Nos. 7 & 8.

(*r*) *Camfield v. Gilbert*, 4 Esp. Ca. 221.

(*s*) *Turner v. Beaurain*, Sitt. Guildh. cor. Lord Ellenborough, C. J., 2d June 1806. MS.

(*t*) *Kirtland v. Pounsett*, 2 Taunt. 145. See p. 146.

wise, it would induce many persons upon speculation to offer an estate for sale, knowing the title to be bad ; and yet, in a late case at *nisi prius*, Mansfield, C. J. held, that the purchaser was not entitled to recover back the expenses of investigating the title(*u*).

But clearly the expenses cannot be recovered under a count for money had and received ; and Lord Ellenborough has decided that they cannot be recovered under a count for money paid, &c. to the defendant's use, as the money is expended for the purchaser's own satisfaction as to the title which he is about to take(*x*). Nor can the expenses of investigating the title be recovered from the auctioneer(*y*).

Where a vendee brings an action on account of the agreement not having been completed, he will be compelled to give the vendor a particular of every matter of fact which he means to rely upon at the trial, as having been a cause of his not being able to complete the purchase ; but he is not bound to state in his particular any of the objections in point of law arising upon the abstract(*z*).

But where no particular has been obtained, the plaintiff is not confined to the objections which he may have stated to the defendant, but may take advantage of any other, which may entitle him to recover as for breach of the agreement(*a*).

To entitle a vendor to sustain an action for breach of contract, it has been said, that he must show what title

(*u*) *Wilde v. Fort*, 4 Taunt. 334. Note, the C. J. also ruled, that interest on the deposit is not recoverable, which is contrary to other authorities ; and too large a construction, according to other authorities, appears to have been put on the statute of Elizabeth.

(*x*) *Camfield v. Gilbert*, 4 Esp. Ca. 221.

(*y*) *Lee v. Munn*, 1 Holt, 569.

(*z*) *Collet v. Thomson*, 3 Bos. & Pull. 246.

(*a*) *Squire v. Tod*, 1 Camp. Cas. 293.

he has; it not being sufficient to plead that he has been always ready and willing, and frequently offered to make a title to the estate (*b*). In a late case (*c*), however, where a vendor averred, *that he was seised in fee*, and made a good and *satisfactory* title to the purchaser of the estate, by the time specified in the conditions of sale, it was held sufficient, and that it was not necessary for him to show how he deduced his title to the fee. And the Court seemed of opinion, in opposition to the prior cases, that a vendor need not display his whole title on the record. This decision, without working an injustice, will in most cases render it unnecessary to load the pleadings with the title of the vendor.

But even if the title is set out, yet the execution of the title-deeds need not be proved, because that is never required of a vendor (*d*). This was decided by Lord Kenyon at *nisi prius*. To prove the plaintiff's title to a right of way sold, the deeds were produced; and it was objected, that the deeds themselves should first be made evidence, by producing the subscribing witnesses. But Lord Kenyon ruled it not to be necessary. He said, he would never allow, where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, or expected in making out a title in any case of a purchase, more particularly where possession has accompanied them: he therefore admitted them without proof of the execution (*e*). In a late case, however, before Lord C. J. Mansfield, at *nisi prius*, where

(*b*) Philips v. Fielding, 2 H. Litt. 303 b; Terry v. Williams, Blackst. 123; and see Duke of St. 1 Moore, 498.
 Alban's v. Shore, 1 H. Black. 270; (*d*) Thomson v. Miles, 1 Esp. Luxton v. Robinson, Dougl. 620. Ca. 184.

(*c*) Martin v. Smith, 6 East, 555; 2 Smith, 543; and see Co. (*e*) Thomson v. Miles, *ubi sup*.

courts of law can take cognizance of equitable objections to a title; because, if they cannot, a purchaser should in such cases file a bill in equity: he might otherwise be compelled to pay damages for not accepting a title, which, although good at law, might be invalid in equity.

The action which a vendor must bring, being founded upon the equitable circumstances of the case between the parties, it seems that a court of law may in such action take cognizance of equitable objections to a title; and if there were any, ought not to permit the plaintiff to recover.

In a recent case (*k*), the Court of B. R. would not permit the assignees of a bankrupt to recover money from his trustees, because the deed by which the trusts were created, although perhaps void at law, would probably be restored and set up again by a court of equity. The Court, I am informed, said they would not permit the assignees to recover, as it would be to no purpose. It would be merely driving the trustees to the other side of the hall, where they would most likely regain the property. This case seems in point; the same observation would apply to a vendor endeavouring to obtain the purchase-money where there were equitable objections to his title: the Court would naturally say, *cui bono*, when the purchaser can compel you to repay it in equity?

Lord Kenyon held, that a court of law could not enter into equitable objections to a title *where the purchaser is plaintiff* (*l*); but Lord Alvanley (*m*) decided, that if a purchaser would be liable in equity, he is entitled to recover his deposit at law. The last case is certainly a very strong authority, because no Judge sitting in a court of law could be more averse than Lord Alvanley was to assume any

(*k*) Shaw v. Jakeman, 4 East, 201.

(*l*) Allpass v. Watkins, 8 Term Rep. 516.

(*m*) Elliott v. Edwards, 3 Bos. & Pull. 181.

Mansfield, in a late case (*q*), said, was, that it is not the employment of any particular word which determines a condition to be precedent, but the manifest intention of the parties.

The old law was certainly in favour of the contrary doctrine (*r*); but if, as Lord Kenyon observed, the Courts were to hold otherwise than they now do, the greatest injustice might be done; for supposing, in the instance of a trader who had entered into a contract for the sale of an estate, that between the making of the contract and the final execution of it he were to become a bankrupt, the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid (*s*).

If, therefore, either a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal.

Thus a vendor cannot bring an action for the purchase-money, without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing (*t*); but if the purchaser give a bill of exchange, or other security, for the purchase-money, payable at a certain day, he must pay it when due, and cannot resist the payment even in the case of a bill of exchange, on the ground that there was no consideration for the drawing of the bill, because the seller has refused to convey the estate

(*q*) *Smith v. Woodhouse*, 2 New Rep. 233. See *Havelock v. Geddes*, 10 East, 555.

(*r*) 8 Term Rep. 370, 371.

(*s*) See *Duke of St. Alban's v. Shore*, 1 H. Black. 270; *Goodison v. Nunn*, 4 Term Rep. 761; *Glazebrook v. Woodrow*, 8 Term

Rep. 366; and *Heard v. Wadham*, 1 East, 619; and see *Amcourt v. Elever*, 2 Kel. B. R. 159; *Carpenter v. Cresswell*, 4 Bingh. 409.

(*t*) *Jones v. Barkley*, Dougl. 684; *Philips v. Fielding*, 2 H. Black. 123; and see 3 East, 443.

according to the agreement. But he will have his remedy upon the agreement for the non-execution of the conveyance (*u*).

On the other hand, a purchaser cannot maintain an action for breach of contract, without having tendered a conveyance, and the purchase-money (*x*).

This last position has, however, been rendered doubtful by some recent *dicta* of the Judges (*y*), that it is incumbent on the *vendor* to prepare and tender a conveyance, which, as a general rule, certainly seems to have prevailed when the simplicity of the common law reigned, and possession was the best evidence of title; but upon modifications of estates being introduced, which were unknown to the common law, and which brought with them all the difficulties which surround modern titles, it became necessary to make an abstract of the numerous instruments relating to the title, for the purpose of submitting it to the purchaser's counsel: and it then became usual for him to prepare the conveyance. This practice has continued, and is now the settled rule of the Profession: the rule is, indeed, sometimes departed from, but this seldom happens except in the country, and it always arises from consent, or express stipulation.

In a late case (*z*), this point came distinctly before the Court of Exchequer, and it was, in conformity to the present practice of the Profession, decided, that the purchaser, and not the vendor, is bound to prepare and tender the

(*u*) See *Moggridge v. Jones*, 14 East, 486; 3 Camp. Ca. 38; and See *Swan v. Cox*, 1 Marsh. 176.

(*x*) See 1 Esp. Ca. 191; *ex parte Hylliard*, 1 Atk. 147.

(*y*) Lord Rosslyn, in *Pincke v. Curteis*, 4 Bro. C. C. 332; *Macdonald, C. B.* in *Growsock v. Smith*,

3 Anstr. 877; Lord Kenyon, in *Heard v. Wadham*, 1 East, 627; and Lord Eldon, in *Seton v. Slade*, 7 Ves. jun. 278.

(*z*) *Baxter v. Lewis*, 1 Forrest's Rep. Exch. 61; and see *Martin v. Smith*, 2 Smith, 543; but see *Standley v. Hennington*, 6 Taunt. 561.

conveyance. In the early case of *Webb v. Bettel* (a), the same rule was expressly recognized by Windham, J. and denied by no one. He said, "that where a person is to execute a conveyance generally, there the counsel of the purchaser is intended to draw it, and then the purchaser ought to tender it.

It is settled, that if a conveyance is to be prepared at the expense of a purchaser, he is bound to tender it (b). Now it is admitted on all hands, that the expense of the conveyance must be borne by the purchaser, if there be no express stipulation to the contrary. Therefore, where there is no such stipulation, the purchaser is bound to tender the conveyance.

Upon the whole, notwithstanding the recent *dicta* to the contrary, as the precise point came before the Court of Exchequer, in *Baxter v. Lewis*, and their decision accords with the *uniform practice* of conveyancers, which has always met with the greatest attention in courts of justice (c), we may perhaps be warranted in saying, that the purchaser, and not the vendor, ought to prepare and tender the conveyance.

If the purchaser is required by the agreement to prepare the conveyance, it is clear that the vendor may maintain an action, or file a bill, without tendering a conveyance (d); and therefore, to prevent all doubt on this point, it seems advisable to stipulate in the agreement or conditions of sale, that the conveyance shall be prepared by, and at the expense of, the purchaser. A purchaser must, however, prepare the conveyance, although it is merely declared that the conveyance shall be at his expense (e).

(a) 1 Lev. 44.

(d) *Hawkins v. Kemp*, 3 East,

(b) *Seward v. Willock*, 5 East, 410.
198.

(e) *Seward v. Willock*, 5 East,

(c) See 2 Atk. 208; 1 Term 198.
Rep. 772; Wilmot, 218.

value of the house, during the occupation of the purchaser, exceeds the interest of the money paid, yet the seller cannot recover (*k*); for it is impossible to make the rules of law depend on the balance of loss or gain in each transaction: one party must take back his money, and the other take back his house. A contract cannot arise by implication of law, under circumstances, the occurrence of which neither of the parties ever had in their contemplation.

But as the possession is in these cases lawful, being with the assent of the seller, an ejectment will not lie against the purchaser without a demand of possession, and refusal to quit (*l*); unless upon possession being given to him, he agreed to quit possession if he should not pay the purchase-money on a given day, or the like; in which case an ejectment will lie, without notice, on non-performance of his agreement. The agreement operates in the same manner as a clause of re-entry on breach of covenant in a lease (*m*).

A writ of *ne exeat regno* lies against a purchaser who has not paid the purchase-money, upon his threatening to go abroad, if the vendor's title has been accepted (*n*), or there has been a decree for a specific performance after the title has been investigated (*o*). But although the purchaser has taken possession of the property, and received the rents after the delivery of the

(*k*) *Kirtland v. Pounsett*, 2 Taunt. 45.

(*l*) *Doe v. Jackson*, 1 Barn. & Cress. 443; *Right v. Beard*, 13 East, 210. See *Hegan v. Johnson*, 2 Taunt. 148; *Doe v. Lawder*, 1 Stark. 308.

Doe v. Sayer, 3 Camp. Ca. 8.
The doctrine is extended to

an agreement for a lease, *Doe v. Smith*, 6 East, 530; *Doe v. Breach*, 6 Esp. Ca. 106.

(*n*) *Goodwin v. Clarke*, 2 Dick. 497; and Anon. *ibid.* note; see *Jackson v. Petrie*, 10 Ves. jun. 164.

(*o*) *Boehm v. Wood*, 1 Turn. & Russ. 332.

abstract, yet the writ cannot issue; for unless the Court can make it out to be quite clear that there must be a specific performance, it cannot grant the writ (*p*).

If a man convey his estate to trustees to sell and pay debts, and afterwards file a bill to stop the sale, on the ground that the trustees, by giving shorter notice of the intended sale than was usual, and other circumstances, would materially injure the sale, the Court will not grant an injunction upon the filing of the bill to restrain the sale, although it is sworn that the sale is to be made the next day. It is not one of those cases in which, on account of irreparable injury to the plaintiff, the Court proceeds in this summary way. If the trustees shall be guilty of a breach of trust in making the proposed sale, they will be answerable to the plaintiff for the damage sustained (*q*).

Where a man sells an estate for an annuity, without any agreement being made respecting the security to be given for it, he is entitled to have it secured, not only upon the estate, but also by the bond of the purchaser, and a judgment to be entered up against him (*r*). In *Ker v. Cloberry* (*s*), which came before the Court upon a petition between the heir and executor, it appeared that the equity of redemption was sold to the mortgagee for the mortgage-money, and a life-annuity to be paid to the seller and his wife, and the survivor of them, but nothing was said as to the mode in which the annuity was to be secured. It was held to be a purchase of the equity of redemption, subject to the annuity, which ought to be charged on the estate. It was an interest reserved by the seller out of the estate.

A purchaser of an estate subject to incumbrances must

(*p*) *Morris v. M'Neil*, 2 Russ. 604.

(*q*) *Pechell v. Fowler*, 2 Anstr.

550.

(*r*) *Remington v. Deverall*, 2 Anstr. 550.

(*s*) V. C. 27 Mar. 1819, MS.

indemnify the vendor against them, although he did not expressly engage to do so.

Thus a purchaser of a leasehold estate must covenant with the vendor to indemnify him against the rents and covenants in the lease, although he is not required to do so by the agreement for sale (*t*).

So, although a purchaser of an equity of redemption enter into no obligation with the party from whom he purchases, to indemnify him from the mortgage-money, yet equity, if he receives the possession, and has the profits, would, independently of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the mortgage-money; for having become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage (*u*).

And if a purchaser who has not obtained a conveyance sell to another, the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit (*x*).

If a seller agree to give a real security as an indemnity to a purchaser upon his accepting the title, he will be compelled specifically to perform it, although he has not sufficient real estate, and offers a sufficient security upon personal estate (*y*).

It seems that where a mortgagor has agreed to convey his equity of redemption to the mortgagee, the proceedings in an ejectment by the mortgagee cannot be stopped under the 7 Geo. II. c. 20, for the effect of it would be to strip the mortgagee of his legal title, which might let in a posterior equitable right to the prejudice of the mort-

(*t*) *Pember v. Mathers*, 1 Bro. C. C. 52, *et supra*, p. 34.

(*u*) See 7 Ves. jun. 337, *per* Lord Eldon; see *Crofts v. Tritton*, 8 Taunt. 365.

(*x*) *Per* Lord Eldon, in *Wood v. Griffith*, 12 Feb. 1818, MS.

(*y*) *Walker v. Barnes*, 3 Madd. 247.

gagee, though he should thereafter obtain a decree for the performance of the agreement (z). But the relief will be granted to the mortgagor, where the mortgagee has not taken any steps to complete his contract for the purchase of the equity of redemption (a).

A purchaser of an estate let to a tenant from year to year may, without a new contract, or any act corresponding to attornment, recover the rent ; and nothing would be a good defence in an action brought for it but the fact that he did not know of the sale, and had paid his rent before to his lessor (b). So, if the estate is in lease, the purchaser is entitled to the benefit of covenants entered into by the lessee with the vendor (c), and may recover for a breach of the covenants before his time, if he is seised of the reversion during the continuance of the term (d) ; and he may, after notice to the tenant of the conveyance, distrain for rent in arrear (e), whether the estate be freehold or leasehold (I).

(z) *Goodtitle v. Pope*, 7 Term Rep. 185.

(a) *Skinner v. Stacy*, 1 Wils. 80.

(b) See 1 Vern. & Scriv. 289 ; *Birch v. Wright*, 1 Term Rep. 378. See *Lumley v. Reisbeck*, 15 East, 99.

(c) See *post*, ch. 13, sect. 1, n. (1).

(d) *Davis's case*, M.T. 42 Geo. III. *Woodfall's Land. and Ten.* 529, 2d edit.

(e) See *Moss v. Gallimore*, Dougl. 259.

(I) It was recently proposed to deprive all middle-men, even in England, of the right to distrain for rent in arrear. Thus, suppose a building lease to be granted by John to James for ninety-nine years, at 10*l.* a year ; James builds a valuable house, and underlets to Joseph, for forty years, at 100*l.* a year ; and Joseph underlets to Jacob, for thirty years, at 120*l.* a year ; it is manifest that James has the greatest interest in the property ; and, as the law now appears to stand, he can distrain for his rent, notwithstanding the last underlease. This right was proposed to be taken from him, but the measure was dropped.

In support of the measure, it was contended, that none but the original lessor is entitled to distrain for rent, according to the law of England ; and therefore that, in the case which I have put, James would not be affected by the act ; because he would not, as the law now stands, be en-

If a person having a right to an estate, purchase it of another person, being ignorant of his own title, equity will compel the vendor to refund the purchase money, with interest from the time of bringing the bill, although no fraud appear (*f*).

(*f*) Bingham v. Bingham, 1 Ves. 126. See Lansdown v. Lansdown, Mose. 364; Saunders v. Lord Annesley, 2 Scho. & Lef. 101; Leonard v. Leonard, 2 Ball & Beatty, 171.

titled to distrain. The argument, which was managed with great ingenuity, was rested upon the statute of *quia emptores*, and some passages in Coke upon Littleton. When it is considered, that the right of distress, in the case above supposed, has never been disputed, it will not be matter of surprise, that the attempt to show that the practice is illegal did not succeed. That rent may be distrained for, although fealty is not incident to it, is laid down in Co. Litt. 142, b.; and it seems to be clear, that distress is incident to every rent at common law, where the lessor has a reversion: and that a reversion of a single day is, for this purpose, as operative as a reversion in fee. In the year-book, 14 Edw. III. p. 8. Finchden thought, that if a lessee leased *all* his estate rendering rent, he could not distrain; he had no reversion. In the 2d Edw. IV. p. 11, the very objection was taken, where the lessor had a reversion; because it was only the reversion of a chattel; but it was held, that he had a right to distrain. In Brooke's Abridgment, Distress, case 45, and Rents, case 17, it is laid down, on the authority of this case, that if a man lease for twenty years, and the lessee leases over for ten years, rendering rent, there, if he grant the rent over to another man, he cannot distrain; because he has not the reversion of the term, which gives the right to distrain: contrary, if he had granted to him the *reversion* and the rent. Note the diversity. In Wade v. Marsh, Latch, 211, it was held, that the lessor having only a reversion for years, may, by the common law, distrain for the rent, by reason of the reversion, which causes privity. These cases appear to be quite decisive. The only difficulty has been to find a case; for the point has not been doubted for centuries. It is to be hoped, therefore, that the right of mesne landlords to distrain for rent will not be violated, on the ground that it depends upon a practice not sanctioned by law, and which ought to be abolished; but if it shall appear, as it is alleged, that the remedy has been the source of great oppression against the tenantry of Ireland, the Legislature will, I confidently hope, extend its protection to so valuable a race of men, as far as may be consistent with a due regard to the rights of landlords: for, as Justice Twisden observed, we must not steal leather to make poor mens shoes.

all the timber may give a general notice to the lessor, and if the lessor decline to purchase the timber, the lessee may cut it down at intervals, and need not repeat the notice (*l*).

A *bond fide* purchase of an interest will not be converted into a loan, on account of a power to re-purchase being given to the seller, although at an advanced price; but, if the purchaser, instead of taking the risk of the subject of the contract (*e. g.* an annuity) on himself, take a security for repayment of the principal, that will vitiate the transaction, and render it a mere mortgage security (*m*).

It may here be observed, that the grant of the office of a steward of a manor for life is not revoked by a subsequent sale of the manor, but is binding on the purchaser; although, as lord, he will be entitled to the custody of the court-rolls. In purchasing a manor, therefore, the instrument by which the steward was appointed should be called for. This is a precaution which has never been attended to.

(*l*) *Goodtitle v. Saville*, 16 East, 87. See *Doe v. Abel*, 2 Mau. & Selw. 541.

(*m*) *Verner v. Winstanley*, 2 Scho. & Lef. 393. See *Sevier v. Greenway*, 19 Ves. jun. 413.

CHAPTER V.

OF THE CONSIDERATION.

SECTION I.

Of unreasonable and inadequate Considerations.

I. IT seems that a court of equity cannot refuse to assist a vendor merely on account of the price being unreasonable(*a*): and a specific performance will certainly be enforced, if the price was reasonable at the time the contract was made, how disproportionable soever it may afterwards become.

If, however, a man be induced to give an unreasonable price for an estate, by the fraud (*b*), or gross misrepresentation (*c*), of the vendor ; or by an industrious concealment of a defect in the estate (*d*), equity will not compel him to perform the contract.

And where these circumstances do not appear, but the estate is a grossly inadequate consideration for the purchase-money, equity will not relieve either party. Thus

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| <p>(<i>a</i>) City of London v. Richmond, 2 Vern. 421 ; Hanger v. Eyles, 2 Eq. Ca. Ab. 689 ; Hicks v. Philips, Prec. Ch. 575 ; 21 Vin. Abr. (E), to pl. 1 ; Keen v. Stukeley, Gilb. Eq. Rep. 155 ; 2 Bro. P. C. 396 ; Charles v. Andrews, 9 Mod. 151 ; Lewis v. Lord Lechmere, 10 Mod. 3 ; Saville v. Saville, 1 P. Wms. 45 ; Adams v. Weare, 1 Bro. C. C.</p> | <p>567 ; and the cases, as to inadequacy of price, cited <i>infra</i>.
 <i>(b)</i> See James v. Morgan, 1 Lev. 111, a case at law. Conway v. Shrimpton, 5 Bro. P. C. last edit. 187.
 <i>(c)</i> Buxton v. Cooper, 3 Atk. 383.
 <i>(d)</i> Shirley v. Stratton, 1 Bro. C. C. 440.</p> |
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in a case at the Rolls before Lord Alvanley, by original and cross-bill, the estate was represented on the one hand of the value of 9 or 10,000 *l.*; and on the other of only 5,000 *l.* The contract was for 6,000 *l.*, and 14,000 *l.* at the death of a person aged sixty-five. Lord Alvanley said, it was not a case of actual fraud; but it was insisted the bargain was grossly inadequate; and the inadequacy was very great: it was impossible upon the whole evidence to make the estate to be worth more than 10,000 *l.*; though he ought not to decree a performance, yet as no advantage was taken of necessity, &c. he was not warranted to decree the vendor to deliver up the contract, the only inconvenience of which would be, that an action would lie for damages; and he accordingly dismissed both bills (*e*).

Indeed few contracts can be enforced in equity where the price is unreasonable, because contracts are not often strictly observed by either party; and if an unreasonable contract be not performed by the vendor, according to the letter in every respect, equity will not compel a performance *in specie* (*f*).

II. It appears to be settled, that mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance to a purchaser (*g*), particularly where the estate is sold by auction (*h*).

(*e*) *Day v. Newman*, 2 Cox, 77; 10 Ves. jun. 300, cited; and see *Squire v. Baker*, 5 Vin. Abr. 549, pl. 12.

(*f*) See the cases cited in n. (*a*), *ante*; and *Edwards v. Heather*, Sel. Cha. Ca. 3.

(*g*) *Coles v. Trecothick*, 9 Ves. jun. 234; *Burrows v. Lock*, 10 Ves. jun. 470. See *Young v. Clark*,

Prec. Cha. 538; *Barrett v. Gomeserra*, Bunb. 94; *Underwood v. Hithcox*, 1 Ves. 279; *Mortlock v. Buller*, 10 Ves. jun. 292; and *Lowther v. Lowther*, 13 Ves. jun. 95; *Western v. Russell*, 3 Ves. & Bea. 187.

(*h*) *White v. Damon*, 7 Ves. jun. 30. See *Collet v. Woollaston*, 3 Bro. C. C. 228.

In *White v. Damon*, however, although the estate was sold by auction, Lord Rosslyn dismissed the bill merely on account of the inadequate price given for the estate, viz. 1,120*l.* and it was worth 2,000*l.*; but on a rehearing before Lord Eldon, although the decree was affirmed upon a different ground, yet his Lordship said, he was inclined to say that a sale by auction, no fraud, surprise, &c. cannot be set aside for mere inadequacy of value. It would be very difficult, he said, to sustain sales by auction, if the Court would not specifically perform the agreement. And in a subsequent case (*i*), his Lordship expressed the same opinion, and referred to the case of *White v. Damon*.

But if an uncertain consideration (as a life-annuity) be given for an estate, and the contract be executory, equity it seems will enter into the adequacy of the consideration (*k*).

Although a purchaser is not bound to acquaint the vendor with any latent advantage in the estate (*l*), yet a concealment, for the purpose of obtaining an estate at a grossly inadequate price, may be deemed fraudulent.

Thus in the case of *Deane v. Rastron* (*m*), an agreement was made for sale of land at a halfpenny per square yard. The price was in all about 500*l.*, the real value 2,000*l.* The purchaser went out to an attorney, got him to calculate the amount, and desired him not to tell the vendor how little it was; then carried the agreement to the vendor, and prevailed on him to sign it immediately. The Court of Exchequer said, the desire of concealment would be such a fraud as to void the transaction, as parties to a contract

(*i*) *Ex parte Latham*, 7 Ves. jun. 3 Bro. C. C. 605.
35, note.

(*l*) See 2 Bro. C. C. 420.

(*k*) *Pope v. Root*, 7 Bro. P. C. 134; *Mortimer v. Capper*, 1 Bro. C. C. 156; and *Jackson v. Lever*,
(*m*) 1 Anst. 64; and see *Young v. Clerk*, Prec. Cha. 538; *Lukey v. O'Donnell*, 2 Scho. & Lef. 466.

are supposed, in equity, to treat for what they think a fair price.

So a misrepresentation by the purchaser, who was the agent of the seller, of the value of the estate, although it operated only to a small extent, has been held to be a sufficient defence against a bill for a specific performance; for to entitle a person to call for the aid of a court of equity, he must go there with clean hands (*n*).

Where neither of the parties knows the value of the estate, at the time the contract is entered into, no inadequacy of consideration will operate as a bar to the aid of equity in favour of the purchaser.

Thus, in a case (*o*) where a common was to be inclosed, one man having a right of common, agreed, before the commissioners had made any allotment, or any one could know what it was to be, to sell his allotment for 20 *l*. Afterwards it turned out to be worth 200 *l*. Sir Joseph Jekyll said, the contract ought to be enforced, as no one could know what the allotment would be; and both parties were equally in the dark; *but it might be different if the circumstances had been known to the plaintiff*.

But, whether an estate is sold by auction, or by private agreement, equity will be as vigilant in discovering an excuse for refusing to perform the contract, where the price is inadequate, as it will where the consideration is unreasonable (*p*).

III. A conveyance executed will not, however, be easily set aside on account of the inadequacy of the considera-

(*n*) *Cadman v. Horner*, 18 Ves. jun. 10; *Wall v. Stubbs*, 1 Madd. 80.

(*o*) *Anon.* 1 Bro. C. C. 158; 6 Ves. jun. 24, cited; but see 2 Atk. 134.

(*p*) *Whorwood v. Simpson*, 2

Vern. 186; *Emery v. Wase*, 5 Ves. jun. 846; 8 Ves. jun. 505; *Twinning v. Morris*, 2 Bro. C. C. 326; and see the cases cited in n. (*a*) *supra*; and see *Mortlock v. Buller*, 10 Ves. jun. 292; *Maddeford v. Austwick*, 1 Sim. 89.

tion; for there is a great difference between establishing and rescinding an agreement (*q*). It is not sufficient to set aside an agreement in equity, to suggest weakness and indiscretion in one of the parties who has engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can show fraud in the party contracting with him, or some undue means made use of to draw him into such an agreement (*r*). To set aside a conveyance, there must be an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it (*s*). The truth is, that in setting aside contracts, on account of an inadequate consideration, the Court proceeds on fraud. In all such cases, however, the basis must be gross inequality in the contract, otherwise the party selling cannot be said to be in the power of the party buying; unless actual imposition is proved by gross inequality, other circumstances of fraud will pass for nothing; the basis must be gross inequality (*t*).

But a conveyance obtained for an inadequate consideration, from one not conscious of his right, by a person

(*q*) See *Dews v. Brandt*, Sel. Cha. Ca. 7; *Cases, Dom. Proc.* 1728; *Hamilton v. Clements*, Cas. Dom. Proc. 1766.

(*r*) *Per* Lord Hardwicke, *Willis v. Jernegan*, 2 Atk. 251.

(*s*) *Per* Lord Thurlow in *Gwynne v. Heaton*, 1 Bro. C. C. 1; and see *Stephens v. Bateman*, 1 Bro. C. C. 22; *Floyer v. Sherard*, Ambl. 18; *Heathcote v. Paignon*, 2 Bro. C. C. 167, and the cases there cited; *Spratley v. Griffiths*, 2 Bro. C. C.

179, n.; *Low v. Barchard*, 8 Ves. jun. 133; *Underhill v. Horwood*, 10 Ves. jun. 209; 14 Ves. jun. 28; *Verner v. Winstanley*, 2 Scho. & Lef. 393; *Mac Ghee v. Morgan*, *Bruce v. Rogers*, *ib.* 395; *Darley v. Singleton*, 1 Wight. 25; *Evans v. Brown*, *ib.* 102; *Ex parte Thistlewood*, 1 Rose, 290; *Stilwell v. Wilkins*, 1 Jac. 280.

(*t*) *Per* Lord Thurlow in *Gartside v. Isherwood*, 1 Bro. C. C. 558.

who had notice of such right, will be set aside, although no actual fraud or imposition is proved (*u*).

So if advantage is taken of the distress of the vendor, the sale will be set aside (*x*): and this was done in the case, although the purchaser was really run to great hazard, and was to be at great expense and trouble in the foreseen and unavoidable law-suits about the estate, the issue of which was very doubtful (*y*).

The reader will perceive that in this chapter a distinction is taken between contracts in *fieri*, and contracts actually executed; but in the case of *Coles v. Trecothick* Lord Eldon appears to have been of opinion, that such distinction exists. His Lordship said, that unless inadequacy of price is such as shocks the conscience, it amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not a sufficient ground for *refusing a specific performance*.

IV. In treating of inadequacy of price, we must be careful to distinguish the cases of reversionary interests, from the rules respecting which, especially where an heir or vendor, depend upon principles applicable only to themselves, and not easily definable (*a*). The heir of a family dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable

(*u*) See *Evans v. Luellyn*, 2 Bro. C. C. 150; and the cases cited in the next note.

(*x*) *Herne v. Meers*, 1 Vern. 465; 1 Bro. C. C. 176, n.; *Gould v. Okenden*, 4 Bro. P. C. by Toml. 193; *Ferguson v. Maitland*, Gro. and Rud. of Law and Eq. p. 89, pl. 1; *Pickett v. Loggon*, 14 Ves. 215; *Murray v. Palmer*, 2 Scho. & Lef. 474.

(*y*) *Gordon v. Crawford*, the House of Lords; Gro. and Rud. of Law and Eq. pl. 92, Printed Cases *Dom. Proc.* 1

(*z*) 9 Ves. jun. 234; *sed q* see the cases cited in this chapter

(*a*) See 9 Ves. jun. 243; 5 Contr. 181; 3 Wooddes. 460; Gilb. Lex Prætor. 291; 1 Eq. c. 11, s. 12, and Mr. *blanque's* notes, *ibid.*

gain made with him, shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed (*b*). There are two powerful reasons why sales of reversions by heirs should be discountenanced; the one, that it opens a door to taking an undue advantage of an heir being in distressed and necessitous circumstances (*c*), which may perhaps be deemed a private reason: the other is founded on public policy, in order to prevent an heir from shaking off his father's authority, and feeding his extravagances by disposing of the family estate (*d*). Every case of this nature must, however, depend on its own circumstances; the Courts profess not to lay down any particular rules, lest devices should be framed to evade them.

The circumstance of the heir being unprovided for, will not prevail much in the purchaser's favour: the remoteness or uncertainty of the interest is not material, if the terms be unreasonable, nor can much stress be laid upon the purchaser incurring the risk of the loss of his money, in case the heir die before he come into possession; nor will the acquiescence of the seller during the continuance of the same situation in which he entered into the contract prejudice him (*e*).

The adequacy of the consideration is considered with reference to the time of the contract and not to the event, and the burden lies on the *purchaser* in these cases

(*b*) *Per* Lord Thurlow, 1 Bro. C. C. 10. See *Nott v. Hill*, 1 Vern. 167; 2 Vern. 27; *Berney v. Pitt*, 2 Vern. 14; *Earl of Ardglass v. Muschamp*, 1 Vern. 237; *Twisleton v. Griffith*, 1 P. Wms. 310; *Curwyn v. Milner*, 3 P. Wms. 293, n. (C); *Sir John Barnardiston v. Lingood*, 2 Atk. 133; *Baugh v.*

Price, 1 Wils. 320; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Bernal v. Donegal*, 3 Dow, 133.

(*c*) *Sir John Barnardiston v. Lingood*, 2 Atk. 133.

(*d*) *Cole v. Gibbons*, 3 P. Wms. 290. See *Barnard. Cha. Rep.* 6.

(*e*) *Gowland v. De Faria*, 17 Ves. jun. 20.

to show that a full and adequate consideration was paid (*f*).

A very anxious protection is also extended by equity to persons selling reversionary interests, who are not heirs, although certainly the same reasons do not occur in support of it (*g*).

But a *bond fide* sale of a reversionary estate cannot be set aside, whether the vendor be an heir or not (*h*), unless fraud or imposition be expressly proved, or be implied from the inadequacy of the consideration, or other circumstances attending the sale (*i*), although in a late case it was deemed sufficient to avoid the contract (*k*), that the consideration was not equal to the calculated value in the tables. If the bill be delayed for a great length of time (*l*), or the vendor, with full notice of all the circumstances, and of his right to set aside the contract, confirm the purchase (*m*), equity will not relieve against the sale, although the aid of the Court could not originally have been withheld.

Where a sale is set aside on account of the inadequacy of the consideration, it is upon the principle of redemption, and the conveyance will stand as a security for the

(*f*) *Gowland v. De Faria*, *ubi sup.*; *Evans v. Griffith*, *Farmer v. Wardell*, 17 Ves. jun. 24, cited; *Medlicott v. O'Donel*, 1 Ball & Beatty, 136.

(*g*) *Wiseman v. Beake*, 2 Vern. 121; *Cole v. Gibbons*, 3 P. Wms. 290.

(*h*) *Dews v. Brandt*, Sel. Ca. Cha. 8; and see 1 Bro. C. C. 6.

(*i*) *Nicols v. Gould*, 2 Ves. 422; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Peacock v. Evans*, 16 Ves. jun. 512; *Ryle v. Brown*, 13 Price, 758.

(*k*) *Gowland v. De Faria*, 17

Ves. jun. 20. The decision was appealed from, but the suit was compromised by *Gowland* (the seller) paying the costs and a sum of money to *De Faria*, (the purchaser) beyond the sum decreed to him at the Rolls.

(*l*) *Moth v. Atwood*, 5 Ves. jun. 845; but see *Roche v. O'Brien*, 1 Ball & Beatty, 330.

(*m*) *Cole v. Gibbons*, 3 P. Wms. 290; *Chesterfield v. Janssen*, 1 Atk. 301; 2 Ves. 549. See *Baugh v. Price*, 1 Wils. 320; *Morse v. Royal*, 12 Ves. jun. 355; *Roche v. O'Brien*, 1 Ball & Beatty, 330.

principal and interest, and even costs (*n*); but compound interest will not be allowed, however long the purchaser has been kept out of his money (*o*); in many cases, therefore, the seller is not merely relieved against the contract, but a considerable benefit is given to him at the expense of the purchaser. In a late case, where interest had been paid on the purchase money, the payments were considered to be of principal and not interest, and the seller was charged with interest on all the sums received by him, whether received as interest or as principal (*p*).

So the purchaser will be allowed for lasting and valuable improvements, and will not like a mortgagee be charged with what without wilful default he might have made (*q*).

The rules on this head have a strong tendency to stop altogether the sale of reversions; but as this is not possible, they must necessarily have the effect of preventing the sale of reversions at their fair market value. It is perfectly well known that reversions upon sales, even by auction, fetch on an average only two thirds of the sum at which they are valued in the tables: according to the late case of *Gowland v. De Faria* (*r*), this does not seem to operate in a purchaser's favour, although the value of a thing is at last not to be regulated by calculation, but as it is vulgarly termed by what it will fetch. Experience

(*n*) *Twisleton v. Griffith*, 1 P. Wms. 310; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Peacock v. Evans*, 16 Ves. jun. 512; *Bowes v. Heaps*, 3 Ves. & Bea. 117; but in *Nicols v. Gould*, 2 Ves. 423, Lord Hardwicke thought he could not set aside the purchase without making the purchaser pay costs; and see *Baugh v. Brice*, 1 Wils. 320; *Gowland v. De Faria*, 17 Ves. jun. 20; *Morony v. O'Dea*, 1 Ball

& Beatty, 109, and the Reporter's note; and *Wood v. Abrey*, 3 Madd. 417.

(*o*) *Gowland v. De Faria*, 17 Ves. jun. 20.

(*p*) *Murray v. Palmer*, 2 Scho. & Lef. 474.

(*q*) S. C.

(*r*) *Supra*, p. 248, and note. See *Ex parte Thistlewood*, 1 Rose, 290.

has shown, that under the most favourable circumstances, reversions will not fetch their calculated value, which only allows the purchaser five per cent. interest, notwithstanding that his money may be locked up for many years. It seems therefore an equity not founded on reason or convenience, which in these cases inquires the calculated value of the subject of the contract instead of its value according to the well known market price. The effect of such an equity must ultimately be to injure the very persons in whose favour it was introduced. Reversions will never fetch their calculated value. Fair purchasers will not dare to purchase them at their market price, and consequently they will be thrown into the grasp of usurers, who will give very inadequate considerations for them, running the risk of a suit, in which event they will stand in as good a situation as if they had given the fair market price for them.

In a recent case (s) the Chief Baron refused to set aside a private sale of a reversionary interest, although Mr. Morgan the actuary's valuation was 928*l.* 8*s.*, and the price paid was only 630 *l.*, rather more than two thirds of the calculated value. The learned Judge could not bring himself to adopt the principle laid down in *Gowland v. De Faria*. He observed, that in the case before him the price agreed on and actually paid was in his opinion the utmost that according to every human probability could have been obtained. He did not dispute Mr. Morgan's valuation, but the price put by the actuary can never be procured in fact; the witnesses for the defendant prove it, and it requires no witnesses. The price set was the arithmetical value. Now no man will part with his ready money, and all the advantages which the power over it confers, in exchange for a future interest, without some compensation beyond the dry arithmetical

(s) *Headen v. Rosher*, 1 M'Clcl. & You. 89.

value of it. To set this bargain aside would be in effect to decree that no valid bargain for a reversion can be made except by auction; and he did not know how any other sale of such an interest can be sustained, unless Judges proceed on the same principle as he did. This would be a very inconvenient restraint on the power of the owners of such property. A private sale is no doubt, sometimes, an imprudent exercise of that power; but in many situations, and under circumstances of no unfrequent occurrence, it is wise and provident. Every case should turn on its particular circumstances; and he thought there were none in the present case which, either according to sound sense, or to any established course of precedents, affected it.

And in a late case (*u*) Sir John Leach held that the rule did not extend to sales by auction. His Honor said, that the principle of the rule could not be applied by sales of reversion by *auction*. There being no treaty between vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The sale by auction is evidence of the market price. It was said, that pretended sales by auction may be used to cover private bargains; where such cases occur they will operate nothing.

So the same Judge held, that the rule did not apply to a sale by a father, tenant for life, and his son tenant in tail in remainder, for they form a vendor with a present interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estate (*x*).

It must be remarked, that we have no certain rule by which the inadequacy of a consideration can be ascer-

(*u*) *Shelly v. Nash*, 3 Madd. 232. See *Fox v. Wright*, 6 Madd. 111.
 (*x*) *Wood v. Abrey*, 3 Madd. 417.

tained. Our law, indeed, hath in one instance (y) adopted the rule of the civil law ; by which no consideration for an estate was deemed inadequate which exceeded half the real value of the estate ; and Lord Nottingham wished the rule universally prevailed in England (z).

If it be agreed, that the price of an estate shall be fixed by a third person, and such person accordingly name the sum to be paid for the estate, equity will compel a performance *in specie* ; but if the referee do not act fairly, or a valuation be not carefully made, execution of the contract will not be compelled ; especially if there be any other ground upon which the Court can fasten, as a bar to its aid (a).

By the civil law, also, a price was considered sufficiently certain, if it was to be fixed by a person named, and such person accordingly fixed the sum : but it appears by the Institutes (b), “ *Inter veteres satis abundeque hoc dubitatur, constaretne venditio, an non.* ”

Such arbitrators may take the opinion of any third person as evidence, but they cannot merely delegate their authority (c).

If an agreement be made to sell at a fair valuation, the Court will execute it although the value is not fixed. For as no particular means of ascertaining the value are pointed out, there is nothing to preclude the Court from adopting any means adopted to that purpose (d).

But where parties agree upon a specific mode of valua-

(y) *Vide* Duke, 177 ; *et infra*, 346 ; 8 Ves. jun. 505 ; Hall v. ch. 16 ; and see Baldwin v. Roch- Warren, 9 Ves. jun. 605.
fort, 2 Ves. 517, cited.

(z) See Nott v. Hill, 2 Cha. Ca. 120 ; 1 Treat. Eq. 119 ; Grotius *de jure Belli ac Pacis*, L. 2, c. 12, s. 12.

(a) Emery v. Wase, 5 Ves. jun.

(b) III. xxiv. 1. For the cases arising out of this rule, *vide* Vin-
nius, 674.

(c) Hopcraft v. Hickman, 2 Sim. & Stu. 130.

(d) See 14 Ves. jun. 407.

tion, as by two persons, one chosen by each, unless the price is fixed in the way pointed out, the Court cannot enforce the performance of the agreement, for that would be not to execute their agreement, but to make a new one for them. Therefore, where the agreement was to sell at a valuation by arbitrators, to be appointed, or their umpire, and arbitrators were appointed, and differed as to value, and could not agree upon an umpire, the Court refused to interfere (e).

In this respect our law accords with the civil law (f). The same rule is adopted in the Code Napoleon (g). After stating that the price ought to be fixed by the parties, it adds, "Il peut cependant être laissé à l'arbitrage d'un tiers : si le tiers ne veut ou ne peut faire l'estimation, il n'y a point de vente."

If therefore the medium of arbitration or umpirage is resorted to for settling the terms of a contract, and fails, equity has no jurisdiction to determine that though there is no contract at law, there is a contract in equity:—If the instrument assume that the award shall bind the parties personally, the death of one of them before the award will of course be a countermand of the submission at law, and equity cannot enforce the contract (h). So if the arbitrators are named, and one party refuses to execute the arbitration bond, as it is not certain that any award will ever be made, equity will not interfere; for the relief sought is a specific performance by the defendant conveying at such price as the arbitrators named shall hereafter fix, and no award may ever be made (i).

(e) *Milnes v. Gery*, 14 Ves. jun. 400; *Gregory v. Mighell*, 18 Ves. jun. 328; *Gourlay v. Duke of Somerset*, 19 Ves. jun. 429. See *Cooth v. Jackson*, 6 Ves. jun. 34; *Pritchard v. Ovey*, 1 Jac. & Walk. 306.

(f) *Vide supra*.

(g) Code Civil, Liv. 3, Tit. 6, ch. 1, s. 1592.

(h) *Blundell v. Brettargh*, 17 Ves. jun. 232; and see 6 Ves. jun. 34.

(i) *Wilks v. Davis*, 3 Mer. 507.

This proves that neither of the parties to such an agreement can be compelled to nominate an arbitrator under the agreement. The very point was decided in the late case of *Agar v. Macklew* (*k*). A covenant was contained in a lease that the lessees might purchase the reversion at a valuation by two persons, one to be named by the lessor, and the other by the lessees, who were to name an umpire. The lessor refused to name an arbitrator, and upon demurrer it was held that the lessees could not file a bill for a specific performance, or to compel the lessor to nominate an arbitrator. But a party may bind himself by acquiescing in an award not made in the manner required (*l*). And in a case where the contract of sale was for twenty-five years purchase, on an annual value to be fixed by a certain day, by referees named, and the seller prevented the valuation from being made, it was held that he should not be allowed to avail himself of his own wrong. The Court would compel him to permit the valuation to be made according to the contract (*m*).

SECTION II.

Of the Failure of the Consideration before the Conveyance.

I. A VENDEE, being equitable owner of the estate from the time of the contract for sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim (*n*).

(*k*) V. C. 9 Nov. 1825, MS.;
2 Sim. & Stu. 154, S. C.

(*m*) *Morse v. Merest*, 6 Madd.
26.

(*l*) See 17 Ves. jun. 241.

(*n*) See 2 Pow. on Contracts, 61.

Nevertheless this doctrine, however it may seem to flow from the rules mentioned in the preceding chapter, has never been decided till lately.

For in *Stent v. Baily* (*o*), the Master of the Rolls said, "If I should buy a house, and before such time as by the articles I am to pay for the same the house be burnt down by casualty of fire, I shall not in equity be bound for the house (*p*)."

So upon a sale of a leasehold for lives (*q*), previously to the conveyance, one of the lives dropped; and although Lord Keeper Wright decreed a specific performance, yet the report states, that he seemed to think, that if *all* the lives had been dropped before the conveyance, it might have been another consideration, for that the money was to be paid for the conveyance, and no estate being left, there could be no conveyance.

The case of *Cass v. Rudele*, as it is reported in *Vernon* (*r*), is an authority against the *dictum* of the Master of the Rolls, in *Stent v. Baily*; but it appears (*s*) that the case is mis-stated in *Vernon*, and that the decree was founded on a good title having been conveyed.

In a late case (*t*), however, where *A* had contracted for the purchase of some houses which were burned down before the conveyance, the loss was holden to fall upon him, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving notice to the vendee; Lord Eldon being of opinion, that no solid objection could be founded on the mere effect of the accident; because, as the party

(*o*) 2 P. Wms. 220.

(*p*) As to accidents before the contracts, unknown to the parties, see p. 239.

(*q*) *White v. Nutt*, 1 P. Wms. 62.

(*r*) 2 Vern. 280.

(*s*) See 1 Bro. C. C. 157, n.; and the note to Raith. edit. of *Vernon*.

(*t*) *Paine v. Meller*, 6 Ves. jun. 349; and see *Poole v. Shergold*, 2 Bro. C. C. 118; *Revel v. Hussey*, 2 Ball & Beatt. 280; *Harford v. Purrier*, 1 Madd. 532.

by the contract became in equity the owner of the premises, they were his to all intents and purposes (I). This decision proceeded on the only principle upon which it can be supported—that the purchaser was in equity owner of the estate. And therefore, in a case where a similar accident happened to an estate sold before a Master, and the report had only been confirmed *nisi*, the loss was holden to fall on the vendor (*u*).

Lord Eldon's decision in *Paine v. Meller*, exactly accords with the doctrine of the civil law. Indeed this very case is put in the Institutes (*x*). "*Cum autem emptio et venditio contracta sit, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque si—aut ædes totæ, vel aliqua ex parte, incendio consumptæ fuerint—emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere.*"

It is hardly necessary to remark, that although the Court will enforce a specific performance, notwithstanding the estate is destroyed, yet this will not be done unless the title be good, or the purchaser has, previously to the accident, waved any objections to it.

The case of *Paine v. Meller* may be considered as having also settled, that a purchaser would be entitled to any

(*u*) *Ex parte Minor*, 11 Ves. jun. 559. *Vide* p. 53. See *Zagury v. Furnell*, 2 Campb. 240. (*x*) III. xxiv. 3. Read Puff. *de Jure Naturæ et Gentium*, l. 5, c. 5. s. 3.

(I) In the 2d vol. of Coll. of Decis. p. 56, are the two following cases:—The peril of a house sold, and thereafter burnt, was found to be the buyer's, though the disposition bore an obligation to put the buyer in possession, because the buyer did voluntarily take possession and rebuild the house, and likewise was enfeoffed before the burning. *Hunter v. Wilsons*.—A house bought being burnt, the Lords found, that the property being transferred to the buyer, by his being enfeoffed, and the keys being offered to him, the accidental loss must follow the buyer, although there was a part of the price unpaid, there being a difference about it, which was referred to some friends to be determined, and which they had not done when the burning happened. *Atchison v. Dickson*.

benefit accruing to the estate after the agreement, and before the conveyance; for Lord Eldon said, “ If a man had signed a contract for a house upon that land which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it.”

This also appears to have been admitted in a case (*y*) where a man contracted for the purchase of a reversion, and afterwards the lives dropped before the contract was carried into execution; for, although the Court did not decree a specific performance, they proceeded entirely on the laches and trifling conduct of the purchaser, and never even hinted that the contract should not be performed on account of the lives having dropped.

Indeed this point flows from the *decision* in *Paine v. Meller*; and it was the rule of the civil law, that the purchaser should benefit by the accretion to the estate before the conveyance: *nam et commodum ejus esse debet cujus periculum est* (*z*).

These cases suggest the observation that, in agreements for the purchase of houses, some provision should be made for their insurance until the completion of the contract.

II. It equally follows, from the general rule of equity, by which that which is agreed to be done is considered as actually performed, that if a person agree to give a contingent consideration for an estate, as an annuity for the life of the vendor, and the vendor die before the conveyance is executed, by which event the annuity ceases, yet the purchaser will be entitled to a specific performance of his contract. This, we observe, is a much stronger case

(*y*) *Spurrier v. Hancock*, 4 Ves. jun. 667; and see P. Wms. 62.

(*z*) *Inst. ubi sup.*

than that before discussed. There a loss was actually sustained, and the only question was, upon whom it should fall. But in this case, if performance of the agreement were not compelled, the parties would stand in precisely the same situation as before the contract; whereas, by performing the agreement, the estate is given to the purchaser, without his paying any consideration for it. A steady adherence to principle compels the Court to overlook the hardship of this particular case, and the doctrine rests upon high authority.

Thus in the case of *Mortimer v. Capper* (*a*), *A.* contracted to sell an estate to *B.* for 200*l.* and 50*l.* a year annuity; and two days after the contract was reduced into writing, *A.* was found drowned: the Lord Chancellor directed an inquiry as to the value of an annuity for the life of *A.*, in order to introduce the question, whether an estate being disposed of for an annuity, which is a contingency, the contract shall fall to the ground, if no payment of the annuity shall be made. He said, that he thought, if the price were fair, the contract ought not to be cut down, merely because the annuity, which was a contingent payment, never became payable.

The parties in the above cause were so well satisfied with the opinion of the Court, that they never, it is said, brought it back for further directions (*b*).

So in a later case (*c*), where *A.* sold an estate by auction, in consideration of a life annuity (I), the first payment to be made on the 25th of December 1787; but in case he should die before the 29th of September 1787,

(*a*) 1 Bro. C. C. 156. See *Wyvill v. Bishop of Exeter*, 1 Price, 292.

(*b*) See 3 Bro. C. C. 609, *sed qu.*
(*c*) *Jackson v. Lever*, 3 Bro. C. C. 605.

(I) See Appendix, No. 12, for a statement of the new Annuity Act, and an inquiry into the expediency of raising the legal rate of interest.

up to which time he was to receive the rents, the contract should be void. *A.* died on the 1st of February 1788, after a sudden and short illness of only two days; and owing to some delays, the conveyances were not executed. The quarter's payment, due at Christmas, was tendered to the vendor's agent by the purchaser, a few days after it became due; but the agent declined receiving it, saying, that the conveyance would be soon completed, and that it was not necessary for the purchaser to make such payment in the mean time. On the first hearing, Lord Thurlow said, he did not see that if an annuity was contracted for, why the consideration should not be paid. It was, he said, objected, that the contract could not be carried into execution *modo et forma*, and that had great weight where there had been no payment. His Lordship afterwards made his decree for a specific performance, on payment of the arrears of the annuity, the consideration for the purchase of the estate.

The case of *Paine v. Meller* bears on this point also. Lord Eldon, in delivering judgment, said, that as to the annuity cases, and all others, the true answer had been given; that the party has the thing he bought, *though no payment may have been made*; for he bought subject to contingency; and in the later case of *Coles v. Trecothick*, his Lordship expressed the same opinion (*d*).

But if in a case of this nature, a payment of the annuity become due before the death of the vendor, and the purchaser *neglect to make or tender it*, he cannot insist upon a specific performance.

This was decided by the case of *Pope v. Root* (*e*). *A.* contracted with *B.* for the sale of an estate to him, in consideration of a life annuity, and the completion of the agreement was delayed by the illness of a mortgagee, who

(*d*) See 9 Ves. jun. 246.

(*e*) 7 Bro. P. C. 184.

was to have been paid off. Two days after the time mentioned for completing the purchase, *A.* met with an accident, and died within a few days. By the terms of the contract, the first payment of the annuity became due previously to the death of *A.*, but it was not paid or tendered. And Lord Chancellor Bathurst dismissed the bill for a specific performance, and the decree was affirmed in the House of Lords (*f*), (I).

The reader will observe, that the decisions in the cases of *Mortimer v. Capper* and *Jackson v. Lever*, do not infringe upon that of the House of Lords, in the prior case of *Pope v. Root*, but reduce the rules on this subject to an equitable and uniform standard ; for the only case in which a purchaser cannot require the assistance of equity, is where he has by laches forfeited his right to its aid, namely, where a payment of the annuity became due, and he neglected to pay or tender it.

To obviate all doubt, it seems advisable in agreements for purchase, where the consideration is an annuity for the life of the vendor, to expressly declare, that the death of the vendor, previously to the completion of the contract, shall not put an end to it, although a payment of the annuity shall not have become due, or having become due, shall not have been made or tendered ; but that, on the contrary, the purchaser shall be entitled to a conveyance, on payment of the annuity up to the death of the vendor.

In the cases just dismissed, the *purchaser*, by the death of the vendor, obtained the estate without paying any, or

(*f*) See Lord Bathurst's decision in *Baldwin v. Boulter*, 1 Bro. C. C. 15 , cited.

(I) One writer thought, that the inadequacy of the consideration influenced this decision ; see 2 Pow. on Contracts, 76 ; but it does not appear that any inadequacy was actually proved.

ly a nominal consideration for it. Perhaps a case may **rise** where the vendor having received the purchase **money**, may, by the death of the purchaser, be entitled to **retain** the estate also, although he may not be his heir.

This case was put in the argument of *Burgess v. Wheate* (g): a purchase, and the money paid by the purchaser, who dies without heir, before any conveyance. It was said, if the lord could not claim the estate, and pray a conveyance, the vendor would hold the estate he has been paid for, and keep the money too. Sir Thomas Clarke, in delivering his opinion, said, that he thought the lord could not pray the conveyance; to say he could was begging the question. And as to the vendor's keeping both the estate and the money, it was analogous to what equity does in another case; as where a conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor, for the personal representatives of the purchaser; which would leave things in *statu quo*.

It may be doubted, however, whether this case, if it should ever arise, would be decided according to Sir Thomas Clarke's opinion. Where a lien is raised for purchase money under the usual equity (h), in favour of a vendor, it is for a debt really due to him, and equity merely provides a security for it. But in the case under consideration, equity must not simply give a security for an existing debt; it must first *raise* a debt against the express agreement of the parties. The purchase money was a debt due to the vendor, which upon principle it would be difficult to make him repay. What power has a court of equity to *rescind* a legal contract like this? The question

(g) 1 Blackst. 123.

(h) *Vide infra*, ch. 12.

might perhaps arise if the vendor was *seeking* relief in equity, but in this case he must be a defendant. If it should be admitted that the money cannot be recovered, then of course he must retain the estate also, until some person appear who is by law entitled to require a conveyance of it.

It has been decided that a specific performance will be decreed of a contract for sale of a life annuity, although the annuitant be dead before the bill be filed, provided the contract was a continuing one at his death (*i*). This is the converse of the point decided in *Mortimer v. Capper*, and that line of cases. The Vice-Chancellor (Sir John Leach) observed, that it may now be considered as the settled law of the court, by the cases of *Mortimer v. Capper*, and *Jackson v. Lever*, and the reported *dicta* of Lord Eldon, especially in the case of *Coles v. Trecothick*, that if the price of property be an annuity for the life of the vendor, his death before the conveyance will form no objection to the specific performance of the contract. The vendor agrees to sell for a contingent price, and those who represent him cannot complain that the contingency has turned out unfavourably. The same principle necessarily applies to a case where the life annuity is not the price, but is the subject of the sale. If the annuitant happens to die before the annuity is legally transferred to the purchaser, the death of the annuitant can form no objection to the specific performance of the contract. The purchaser agrees to buy an interest of uncertain duration, and he cannot complain that the contingency is unfavourable to him.

In the above case, the purchaser was entitled to arrears of the annuity, but the annuity was charged on the purchaser's own estate. It was argued that by the death of

(*i*) *Kenney v. Wenham*, 6 Madd. 355.

the annuitant, a legal transfer of the annuity was no longer necessary to the purchaser, and the only act to be done was the payment of a sum of money by him to the seller, and that the seller ought therefore to have proceeded at law and not in equity. The Vice-Chancellor said, that a court of equity entertains a suit for specific performance by a purchaser, in order to give him the very subject of his contract; and although the demand of a vendor be merely for a sum of money, it will entertain a similar suit for him, upon the principle that the remedies ought to be mutual. If the death of a life-annuitant were to happen at such a time that a purchaser in effect took no benefit under his contract, which might well happen where his title was to commence at a future time, there it might be made a question whether, as at the time of the bill filed a purchaser could file no bill in equity, the principle of mutual remedy could enable the vendor to file such a bill. But that is not this case; here the purchaser has an equitable title to the arrears of the annuity between the time of his purchase and the death of the annuitant, which would in principle now support a bill on his part for specific performance, although the facts of the case would not make such a bill advantageous to him. He considered this case, therefore, strictly a case of mutual remedy, so as to entitle the vendor to file a bill for specific performance; and it appeared to him to make no difference in principle that the annuity being charged upon the estate of the purchaser himself, he could practically satisfy his demand for arrears, by retainer, without the necessity of a legal grant.

CHAPTER VI.

OF THE PARTIAL EXECUTION OF A CONTRACT, WHERE
A VENDOR HAS NOT THE INTEREST WHICH HE PRE-
TENDED TO SELL; AND OF DEFECTS IN THE QUAN-
TITY AND QUALITY OF THE ESTATE.

SECTION I.

Where the Vendor has not the Interest which he sold.

I. **WHERE** a person sells an interest, and it appears that the interest which he pretended to sell was not the true one; as, for example, it was for a less number of years than he had contracted to sell, the purchaser may consider the contract at an end, and bring an action for money had and received, to recover any sum of money which he may have paid in part performance of the agreement for the sale: and the vendor offering to make an allowance *pro tanto*, will make no difference; it is sufficient for the plaintiff to say, it is not the interest which I agreed to purchase (*a*).

But in a late case (*b*) at *nisi prius*, where the agreement was to sell “the unexpired term of eight years lease and good will,” &c. and it appeared that, at the date of the agreement, the unexpired term in the lease was only seven years and seven months, Lord Ellenborough said,

(*a*) *Farrer v. Nightingal*, 2 Esp. Ca. 639; and see *Hearn v. Tomlin*, Peake’s Ca. 192; *Thomson v. Miles*, 1 Esp. Ca. 184; *Mattock v. Hunt*, B. R. 15 Feb. 1806; *Hibbert v. Shee*, 1 Campb. Ca. 113. See also *Duffell v. Wilson*, *ib.* 401; and see ch. 8, *infra*.
(*b*) *Belworth v. Hapell*, 4 Camp. Ca. 140.

that the parties could not be supposed to have meant that there was the exact term of eight years unexpired, neither more nor less by a single day. The agreement must, therefore, receive a reasonable construction, and it seems not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day when the rent was payable, and including, therefore, the current half year. Any fraud or material misdescription, though unintentional, would vacate the agreement, but the defendant might here have had substantially what he agreed to purchase.

So where a house was sold by auction, and no notice was taken of a fee-farm rent of 5*s.* 4*d.* charged upon that and upon other property, to a very great amount, the purchaser brought an action for breach of the agreement, and Sir Vicary Gibbs, for the vendor, the defendant, declined arguing the point (c).

And where a particular described the subject of sale to be an annuity of so much, payable out of the tolls of Waterloo Bridge, the Court considered that the purchaser would make some inquiry as to the annuity; but as the Bridge Act did not speak of any power to redeem the annuities to be granted, *and the annuity was made subject to redemption*, it was held that the contract was not binding on the purchaser; and the Court was of opinion, that sellers should be strictly bound to disclose the real nature of the subject of the contract (d).

But, notwithstanding that the vendor has a different interest to what he pretended to sell, equity will, in some cases, compel the purchaser to take it.

Thus, although the estate is charged with trifling incumbrances, which cannot be discharged, yet it seems that,

(c) *Turner v. Beaurain*, Sitt. well v. Harris, 1 Taunt. 430.
 Guildh. cor. Lord Ellenborough, (d) *Coverley v. Burrell*, M. T.
 C. J. 2d June 1806; and see Barn- 1821. B. R. MS.

under some circumstances, if a satisfactory indemnity can be given against them, equity will compel a specific performance (*e*), (*I*). This, however, is evidently a jurisdiction which cannot be too cautiously exercised. In a late case, Lord Eldon said, that he did not apprehend, that the Court could compel the purchaser to take an indemnity, or the vendor to give it (*f*).

So, although the vendor may not be entitled to the estate for the number of years which he contracted to sell, yet, if the deficiency were not great, equity would certainly decree a performance of the contract at a proportionable price (*g*).

But if the number of years be considerably less than the vendor pretended to sell, equity, so far from interfering in his favour, will assist the purchaser in recovering any deposit which he may have paid.

Thus, in *Long v. Fletcher* (*h*), *A.* pretending he had a term of sixteen years to come, in a house, agreed to sell it to *B.* and *B.* paid 100*l.*, part of the consideration money, down. *B.* entered, but finding that *A.* had only a term of six years in the house, brought his bill to have an account, his money refunded, and the bargain set aside; and accordingly *B.* was decreed to account for the profits, and the consideration money to be refunded, and *B.*, upon his own account, to have tenant allowances made him.

So, if a purchaser contract for what is stated to be an

(*e*) *Howland v. Norris*, 1 Cox, 59; *Halsey v. Grant*, Horniblow *v. Shirley*, 13 Ves. jun. 73, 81; see 2 Swanst. 223; and see *Barnwell v. Harris*, 1 Taunt. 430; see also *Hays v. Bailey*, stated in ch. 7. *post.* *Wood v. Bernal*, 19 Ves. 220.

(*f*) See 1 Ves. & Beam. 225.

(*g*) See *Guest v. Homfray*, 5 Ves. jun. 818; and see *Hanger v. Eyles*, 21 Vin. Abr. (A), pl. 1; 2 Eq. Ca. Abr. 689; see also 10 Ves. jun. 306; 13 Ves. jun. 77.

(*h*) 2 Eq. Ca. Abr. 5. pl. 4.

(*I*) Although it seems evident that this equity would be enforced in a case, for instance, like *Turner v. Beaurain*, yet the cases referred to are not decisive authorities in favour of it.

original lease, and it turn out to be an underlease for the whole term, wanting a few days, it should seem that equity would not compel the purchaser to perform the contract. It is impossible, from the nature of the thing, to make any compensation for the reversion outstanding, and yet it may become very valuable; and it is of great importance to a purchaser of a lease not to have any third person stand between him and the owner of the inheritance (i).

It frequently happens that a contract for a leasehold estate is not carried into execution at the time appointed, and the vendor continues in possession. The estate, of course, daily decreases in value, and a question constantly arises, whether the purchaser shall be compelled to pay the full price originally agreed to be given for the estate, or what arrangement shall be made between the parties.

In a modern case (j), where this point arose, the Master of the Rolls said, the reasonable course which he should adopt, was, that for the time elapsed before the execution of the agreement, in consequence of the pendency of the suit, interest should be paid by the purchaser, and a rent should be set upon the premises in respect of the possession of the vendor.

This rule at once provides for the interests of both parties, and accords with the maxim of equity, by which that which is agreed to be done, is considered as actually performed. The purchase money, from the time of the contract, belongs to the vendor, who is entitled to interest on it while it is retained by the purchaser. The estate from the same time belongs to the purchaser, who is entitled to a rent for it while it is occupied by the vendor.

In *Cuthbert v. Baker* (k), the quit rents of a manor were

(i) *Vide infra*, where an underlease will be enforced against a vendor under an agreement to assign, div. II.

(j) *Dyer v. Hargrave*, 10 Ves.

jun. 505. See and consider *King v. Wightman*, 1 Anst. 80; *Fenton v. Browne*, 14 Ves. jun. 144.

(k) *Reg. Lib. A. 1790*, fol. 442.

stated in the particulars of sale to be 2*l.* a year, and they amounted to only 30*s.* a year; but a performance in specie was decreed, and it was referred to the Master to ascertain what compensation should be allowed in respect of the deficiency.

And it has been held that quit rents are subjects of compensation, probably because they may be regarded as incidents of tenure (*l*).

Where an estate is sold by auction, or before a Master, in lots, and the vendor has not a title to all the lots sold, equity will compel the purchaser to take the lots to which a title can be made, if they are not complicated with the rest; and will allow him a compensation *pro tanto*.

Thus in *Poole v. Shergold* (*m*), a man became the purchaser of several lots of an estate, to two of which no title could be made. And upon the Master's report Lord Kenyon said, he must take it for granted, these two lots were not so complicated with the others, as to entitle the purchaser to resist the whole; and therefore decreed a specific performance *pro tanto*.

But if a title cannot be made to a lot which is complicated with the rest, the purchaser will not be compelled to accept the lots to which a title can be made.

Thus, in *Poole v. Shergold*, before cited, Lord Kenyon said, if a purchase was made of a mansion-house in one lot, and farms, &c. in others, and no title could be made to the lot containing the mansion-house, it would be a ground to rescind the whole contract.

Lord Kenyon seems afterwards to have gone a step farther, and to have been of opinion, that such a contract ought not in any case to be *enforced* against a purchaser.

(*l*) *Eadaile v. Stephenson*, 1 Sim. & Stu. 122.

(*m*) 2 Bro. C. C. 118; 1 Cox, 273. See 6 Ves. jun. 676.

For sitting in a court of law (*n*), he held, that the performance of a contract for the sale of some houses ought not to be compelled, as a title could not be made to all the houses bought; and this, notwithstanding they were sold in separate lots. He said, when a party purchases several lots of this description at an auction, it must be taken as an entire contract; that is, that the several lots are purchased with a view of making them a joint concern. The seller, therefore, shall not, in case of any defect in his title to one part, be allowed to abandon that part at his pleasure, and to hold the purchaser to his bargain for the residue. From such a doctrine much injustice might result, as the part to which a seller could not make a title might be so circumstanced, that without it the other parts would be of little, perhaps of no value; or it might leave it in the power of the seller, or any other person who might come to the possession of such part, to deprive the purchaser of every degree of enjoyment or beneficial use of that part which he had purchased. He added, that a case under circumstances precisely similar to the present, had been decided before him, when Master of the Rolls. That, on that case coming before him, he had found that his predecessor there, Sir Thomas Sewell, had ruled contrary to the doctrine he was now delivering; but that he at the Rolls had overruled Sir Thomas Sewell's determination, with the general approbation of the bar.

And the Court of Exchequer appear to have been of the same opinion as Lord Kenyon. For in a case (*o*), where a person purchased several lots of an estate sold under a decree of the Court, and the biddings were afterwards opened as to one lot, the Court were of opinion, that he had an option to open the biddings as to the rest of the lots.

(*n*) *Chambers v. Griffiths*, 1 Esp. Ca. 149.

(*o*) *Boyer v. Blackwell*, 3 Anstr. 657.

In a late case (*p*), in which most of the authorities on this head were cited, the cases of *Chambers v. Griffiths* and *Boyer v. Blackwell* were not noticed; but I learn that Lord Eldon afterwards mentioned from the bench that he had met with the case of *Chambers v. Griffiths*; and he desired it to be understood, that he was not of the same opinion as Lord Kenyon; and, in a still later case, Lord Eldon expressed an opinion, that Lord Kenyon's rule would not be followed unless it could be shown that there was an understanding that the purchaser was not to take any of the lots unless he could obtain them all (*q*).

The rules laid down in *Poole v. Shergold* must therefore still be considered the law of the Court. It is indeed remarkable, that in *Chambers v. Griffiths*, Lord Kenyon should have overlooked his decision in *Poole v. Shergold*; more especially as it in a great measure obviated the objections which he made to a partial execution by a court of equity of a contract for purchase of several lots of an estate. The doctrine, however, could not apply to an action at law, because although the same man purchase several lots at an auction, yet a distinct contract arises upon each (*r*). *Chambers v. Griffiths* cannot therefore be maintained as an authority even for the legal rule.

Where an estate is sold in one lot, either by private contract, or public sale, and the vendor has not a title to the whole estate, he cannot enforce the contract at law (*s*), unless perhaps a separate value was put on different parts of the estate, in which case the contract in favour of justice may be considered distinct. At law neither a vendor can, on an entire contract, recover part of the purchase

(*p*) *Drewe v. Hanson*, 6 Ves. 38; *James v. Shore*, 1 Stark. 426; jun. 675. see *Baldey v. Parker*, 2 Barn. &

(*q*) 16 July 1816, MS. See Cress. 37.

Lewin v. Guest, 1 Russ. 325.

(*s*) *Tomkins v. White*, 3 Smith,

(*r*) *Emmerson v. Heelis*, 2 Taunt. 435.

money, where he cannot make a title to the whole estate sold ; nor would a purchaser be suffered in a court of law to say, that he would retain all of which the title was good, and vacate the contract as to the rest : such questions being subjects only for a court of equity (*t*).

But if the part to which the seller has a title was the purchaser's principal object, or equally his object with the part to which a title cannot be made, and is itself an independent subject, and not likely to be injured by the other part, equity will compel the purchaser to take it at a proportionate price ; and in these cases it will be referred to the Master, to inquire, " whether the part to which a title cannot be made, is material to the possession and enjoyment of the rest of the estate (*u*)."

Thus in a case (*x*) before Sir Thomas Sewell, a man who had contracted for the purchase of a house and wharf, was compelled to take the house, although he could not obtain the wharf ; and it appeared that his object was to carry on his business at the wharf (*I*) ; which, Lord Kenyon said, was a determination contrary to all justice and reason (*y*).

And in the late case of *Drew v. Hanson* (*z*), which arose upon the sale of an estate, together with the valuable corn and hay tithes of the whole parish, it appeared, that the principal object of the purchaser was the corn

(*t*) *Johnson v. Johnson*, 3 Bos. 13 Price, 698.
& Pull. 162.

(*u*) *M'Queen v. Farquhar*, 11 Ves. jun. 467 ; Reg. Lib. B. 1804, fol. 1095 ; *Knatchbull v. Grueber*, 1 Madd. 153 ; *Bowyer v. Bright*, 13 Price, 698.

(*x*) See 6 Ves. jun. 678 ; 7 Ves. jun. 270, cited ; and see *M'Queen v. Farquhar*, 11 Ves. jun. 467.

(*y*) 1 Cox, 274.

(*z*) 6 Ves. jun. 675.

(*I*) This case has been frequently disapproved of, and would not have been so decided at this day. See 1 Esp. Ca. 152 ; 6 Ves. jun. 679 ; 13 Ves. jun. 78. 228. 427. In *Stewart v. Alliston*, 1 Mer. 26, Lord Eldon expressed himself much more strongly against the principle of these cases, than appears by the report.

In a late case (*p*), in which most of this head were cited, the cases of *Chambliss* and *Boyer v. Blackwell* were not noticed; Lord Eldon afterwards mentioned from ^{what was in the case} that he had met with the case of *Chambers v. ...* desired it to be understood, that he ^{was not to be taken as a rule} opinion as Lord Kenyon; and, in ^{the case of the ...} Eldon expressed an opinion, ^{that the ...} that he would not be followed unless it ^{was not to be taken as a rule} was an understanding that ^{the ...} any of the lots unless he ^{was not to be taken as a rule} c.

The rules laid down in ^{the ...} still be considered the ^{the ...} markable, that in *C* ^{the ...} should have overlo ^{the ...} more especially a ^{the ...} of equ ^{the ...} jections which ^{the ...} tion, that tl ^{the ...} of equity of ^{the ...} ant swearing and ^{the ...} estate. Th ^{the ...} we had nothing to do ^{the ...} action at ^{the ...}. And in the case of *F* ^{the ...} several l ^{the ...} estate was sold before the *M* ^{the ...} upon ^{the ...} stated, that "the whole of the a ^{the ...} be m ^{the ...} subject to a modus for tithe hay of 2 ^{the ...}. *Eldon* was of opinion, that a purchaser ^{the ...} to be tithe-free, or subject to a modus, ^{the ...} pelled to take it with a compensation,

(a) See *Vancouver v. Bliss*, 11 Ves. jun. 458; *Stapylton v. Scott*, 13 Ves. jun. 425. cited *ibid.* land, 5 V. r. Hilbert,

(b) Lord Stanhope's case, 6 Ves. jun. 678, cited; *Lowndes v. Lane*, 2 Cox, 363; 6 Ves. jun. 676, cited; but see *Pincke v. Curteis*, (c) See 17 Ves. 261

(1) It now appears by the report of the case that the estate was only subject to a money-pa-
tithes. *Howland v. Norris*, 1 Cox, 59.

tithes, and that half the hay tithe belonged to the vicar, and the other half was commuted for by a payment of 2*l.* per annum, the nature of which did not appear. Upon the facts, as they then appeared, Lord Eldon would not give judgment, but he seemed clearly of opinion that the hay tithe, if not of great extent *or of such a nature as to prejudice the corn tithe*, was a subject for compensation: but otherwise not, as the purchaser would not get the thing which was the principal object of his contract (*a*).

So in a case (*b*) where a man had articed for the purchase of an estate tithe-free, but which afterwards appeared to be subject to tithes, Lord Thurlow decreed a specific performance, although the purchaser proved, that his object was to buy an estate tithe-free (I).

This, however, to use Lord Eldon's words (*c*), is a prodigious strong measure in a court of equity to say, 'as a discreet exercise of its jurisdiction, that the contract shall be performed, the defendant swearing and positively proving that he would have had nothing to do with the estate if not tithe-free. And in the case of *Ker v. Clobery* (*d*), where the estate was sold before the Master, and the particulars stated, that "the whole of the above lands are only subject to a modus for tithe hay of 2*l.* per annum," Lord Eldon was of opinion, that a purchaser of an estate stated to be tithe-free, or subject to a modus, could not be compelled to take it with a compensation, if the estate is not

(*a*) See *Vancouver v. Bliss*, 11 Ves. jun. 458; *Stapylton v. Scott*, 13 Ves. jun. 425.

(*b*) Lord Stanhope's case, 6 Ves. jun. 678, cited; *Lowndes v. Lane*, 2 Cox, 363; 6 Ves. jun. 676, cited; but see *Pincke v. Curteis*,

cited *ibid.*; and see *Rose v. Calland*, 5 Ves. jun. 136; *Wallinger v. Hilbert*, 1 Mer. 104.

(*c*) See 6 Ves. jun. 679; and see 17 Ves. jun. 280.

(*d*) 26 Mar. 1814, MS.

(I) It now appears by the report of the case published by Mr. Cox, that the estate was only subject to a money-payment of 14*l.* in lieu of tithes. *Howland v. Norris*, 1 Cox, 59.

the-free. His Lordship said, that he had so decided in case from Yorkshire, in which he had told the purchaser, if he would take the estate with a compensation, he must undertake to pay the tithes to the vendor. The question therefore is now at rest.

Where an estate is sold tithe-free, the question whether tithe-free is not a question of title but of fact: if the sale was of lands and of tithes, then the matter of tithe would be matter of title (*e*).

In a late case, upon a sale before a Master, where the particular stated *about* thirty-three acres to be tithe-free, Lord Eldon held, that the principle laid down in *Ker v. Clobery* did not apply (*f*).

In a case, where the estate was described as let on a *ground-lease* at so much per annum, and it turned out that the lease was at rack-rent, Lord Eldon would not support the sale, although there was the usual clause, that errors or mis-statements should not annul the sale (*g*).

Where the particular described the estate as four hundred and twelve acres, two hundred and twenty-seven of which were tithe-free, paying a very small modus; and it appeared that part of the estate represented to be tithe-free was subject to tithes which the owner was willing to sell, Lord Eldon said, that the allegation was, that two hundred and twenty-seven acres "are tithe-free, paying a very small modus," not stating a positive exemption from tithes; and where the contract is to sell an estate tithe-free, the vendor not representing himself to have title to the tithes, without entering into the question, whether the purchaser ought to be compelled to take it if not tithe-free; yet, if he chooses to take it, he cannot

(*e*) *Smith v. Lloyd*, 2 Swanst. 1818, MS.; S. C. 2 Swanst. 222.
224, n.

(*g*) *Stewart v. Alliston*, 1 Mer.

(*f*) *Binks v. Lord Rokeby*, E. T. 26.

compel the vendor to buy the tithes, if there is a positive title to them in purnancy ; all he can have is compensation (*h*).

If a purchaser, with notice, of a defect in a title to a part of the estate which is complicated with the rest, or which is the principal object of his contract, take possession of the estate, and prevent the vendor from making a title, he will be compelled to perform the contract, notwithstanding that he insisted upon the objection at the time he entered (*i*). A deduction from the price will, however, be allowed him, although the situation of the land will not perhaps be taken into consideration.

A purchaser will not be compelled to take an undivided part of the estate contracted for. Therefore, if a man contract with tenants in common for the purchase of their estate, and one of them die, the survivors cannot compel the purchaser to take their shares, unless he can obtain the share of the deceased.

And in a case where under a decree a person purchased two sevenths of an estate in one lot, and a good title was only made to one seventh, the purchaser was allowed to rescind the contract as to the whole of the lot (*k*).

Nor will a purchaser be compelled to take a leasehold estate, for however long a term it may be holden, where he has contracted for a freehold (I). Lord Alvanley expressed

(*h*) *Todd v. Gee*, 17 Ves. jun. 273; *qu.* how is the compensation to be estimated? See *Ker v. Cloberry*, *supra*.

(*i*) See *Calcraft v. Roebuck*, 1 Ves. jun. 221.

(*k*) *Roffey v. Shallcross*, 4 Madd. 227.

(I) As to making a title by a feoffment, and assigning the term to a trustee, see *Saunders v. Lord Annesley*, 2 Scho. & Lef. 73. *Doe v. Lynes*, 3 Barn. & Cress. 388.

a clear opinion on this point (*l*); and it has since been expressly determined by Sir William Grant (*m*), (*I*).

Neither is a purchaser compellable to accept a copyhold estate in lieu of a freehold (*n*), (*II*).

But if an estate is sold as copyhold, and represented as equal in value to freehold, it seems that the vendor will be compelled to perform the contract, although the estate prove to be actually freehold (*o*). If, however, the contract for the sale of a supposed copyhold, stipulate that the sale shall be void if any part is freehold, the subject must be proved as described; and the circumstance of the seller himself, after the first contract, selling the estate to another as copyhold, is not conclusive evidence against him (*p*).

So it is said, that a purchaser of an existing lease is not bound to take a new lease instead of the old one, because the purchaser would become an original lessee, instead of

(*l*) See 4 Bro. C. C. 497; 1 Ves. jun. 226. Hick v. Phillips, Prec. Cha. 575.

(*m*) Drewe v. Corp, 9 Ves. jun. 368; and see 13 Ves. jun. 78. (*o*) Twining v. Morrice, 2 Bro. C. C. 326; and see Browne v. Fenton, *sup.* p. 4.

(*n*) See Twining v. Morrice, 2 Bro. C. C. 326; and Sir Harry (*p*) Daniels v. Davison, 16 Ves. jun. 249.

(*I*) This case is a very strong authority. The vendor was entitled to a term of four thousand years, vested in a trustee for him, and also to a mortgage of the reversion in fee expectant upon the term which was vested in himself and forfeited, but not foreclosed. The person claiming under the mortgagor of the reversion refused to release, and thereupon the bill was dismissed. Lib. Reg. A. 1803, fol. 290. The registrar's book appears to have been again referred to for this case. 1 Sim. & Stu. 201. n.

(*II*) In the case of Sir Harry Hick v. Phillips, on account of the unreasonable price at which the estate was sold, a specific performance was refused, although the vendor offered to procure an enfranchisement of the copyholds. See 10 Mod. 504. But this case cannot be considered as an authority, except on the ground of the price being unreasonable, for equity will in ordinary cases grant the vendor time to procure the fee. See *infra*, ch. 8.

an assignee; and might therefore be subject to burdens, to which he would not have been liable in the latter character (*q*).

If a vendee proceed in the treaty for purchase after he is acquainted with the nature of the tenure, and do not object to it, he will be bound to complete his contract, and cannot claim any compensation on account of the difference in value.

Thus, where an estate was sold as freehold, with a leasehold adjoining (*r*), and it turned out on examination that sixty-two acres were leasehold, and only eight freehold; yet, as the purchaser proceeded in the treaty after he was in possession of this fact, and did not object to the nature of the property, he was held to have waved the objection.

And if a purchaser do object to the tenure, yet, if he proceed in the treaty, it seems that he will be compelled to take the estate, on being allowed a compensation (*s*).

In the case of *Wirdman v. Kent* (*t*), upon a bill filed by vendors for a specific performance, it appeared that part of the lands sold to the purchaser had been previously sold to one Pavey; a specific performance was however decreed, and, as to the lands terrièred to the defendant, but which had been sold to Pavey, that the plaintiffs should procure Pavey to release them to the defendant, *or convey a like quantity of land of equal value to the defendant*.

The particular circumstances of this case do not appear in the report; but it must be presumed, that the land sold to Pavey was not the object of the purchaser; and that other land in the neighbourhood, of equal value, would suit him as well. Indeed, in one report of this case (*u*), it

(*q*) *Mason v. Corder*, 2 Marsh. 332.

(*r*) *Fordyce v. Ford*, 4 Bro. C. C. 494; and see 6 Ves. jun. 670; 10 Ves. jun. 508; *Burnell v. Brown*,

1 Jac. & Walk. 168.

(*s*) See *Calcraft v. Roebuck*,

1 Ves. jun. 221.

(*t*) 1 Bro. C. C. 140.

(*u*) 2 Dick. 594.

is said, that the grievances complained of were disregarded as frivolous.

To guard against the rules established by the foregoing decisions, an express declaration should be inserted in all agreements for purchase of estates, that if a title cannot be made to the whole estate, the purchaser shall not be bound to perform the contract *pro tanto*; and a similar provision should be made where an estate is bought free from tithes, or with any other collateral benefit, which the purchaser may wish to secure.

There may be some rights in an estate not disclosed, which, although in themselves of small value, are incapable of compensation; for example, a right of sporting reserved over the estate, and not disclosed to the purchaser; for it would not perhaps be possible to estimate what difference in value such a reservation made (*x*); and such a right would break in too much upon the enjoyment and ownership of a purchaser, to enable equity with propriety to compel him to take the estate with a compensation.

II. Having considered in what cases a *vendor* may *compel* a performance *pro tanto* of an agreement, which he is unable wholly to perform; we may now inquire in what instances a *purchaser* may insist upon a part performance of an agreement, which the vendor cannot execute *in toto*.

And first, it seems that in every case where an agreement would be in part executed in favour of a vendor, there is much greater reason to afford the aid of the Court at the suit of the purchaser, if he be desirous of taking the part to which a title can be made. And a purchaser may, in some cases, insist upon having the part of an estate to which a title is produced, although the vendor could not compel him to purchase it: it is true, gene-

(*x*) *Burnell v. Brown*, 1 Jac. & Walk. 168.

rally, but not universally, that a purchaser may take what he can get, with compensation for what he cannot have (*y*).

Thus we have seen, that if tenants in common contract for the sale of their estate, and one of them die, the survivors cannot compel the purchaser to take their shares, unless he can obtain the shares of the deceased. But the converse of this proposition does not hold; for it seems that the purchaser may compel the survivors to convey their shares, although the contract cannot be executed against the heir of the deceased (*z*). So even where a vendor has not a title to a part of the estate, and consequently cannot enforce the acceptance of it, yet the purchaser may elect to take it with the title such as it is (*a*). But a purchaser has no such right where the contract stipulates that the contract shall be void if the purchaser's counsel is of opinion that a good title cannot be made to the estate (*b*).

If a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of the contract. For the person contracting under these circumstances is bound by the assertion in his contract: and if the vendee chooses to take as much as he can have, he has a right to that, and an abatement (*c*).

Therefore in a case where the estate was sold for twenty-one years, and represented as held under a church lease, usually renewed every seven years, and it appeared

(*y*) 1 Ves. & Beam. 358, *per* Lord Eldon; *Western v. Russell*, 3 Ves. & Beam. 187.

(*z*) *Attorney-general v. Gower*, 1 Ves. 218.

(*a*) *Vide infra*.

(*b*) *Williams v. Edwards*, 2 Sim.

(*c*) *Per* Lord Eldon, 10 Ves. jun. 31, 516. The same doctrine was laid down by his Lordship in *Wood v. Griffith*, 12 Feb. 1818; and see 2 Ves. jun. 439, *acc. per* Lord Rosslyn.

that the seller was only entitled for life to part ; the *purchaser* filed a bill for a specific performance with a reduction. The seller insisted that the purchaser might have an option to put an end to the contract, but that he (the seller) ought not to be compelled to take less than the stipulated price. The decree, however, was for a specific performance, with a reduction of the purchase money, the interest of the seller being less valuable than it had been represented to the purchaser (*d*). Lord Eldon has since observed, that the consequence of this decision was, that if the lives should endure beyond the period of twenty-one years, the purchaser would have the premises as well as the compensation. In that respect the case was new, and deserved great consideration. The Lord Chancellor added, that in a conversation which he had with the Master of the Rolls, they inclined to think it might be right upon this reasoning, that the estate was purchased subject to a contingency affecting its immediate value ; he could not carry it to market, he could do nothing with it that would make it absolute property in him as if he had an absolute term of twenty-one years ; but as the compensation might be aggravated enormously, beyond the actual value, so it might be much too small, and the Court would throw the chances together. The only other course was to adopt the principle of indemnity, either by taking security, or laying hold of part of the purchase money, with a view to compensation if the case should arise, and that was open to this difficulty, that the property held subject to the question of indemnity remains unsaleable, unmarketable, and of infinitely less value than it would otherwise be.

In a later case (*e*), upon a sale of leasehold for lives, the representation of the seller was held to amount to this : that the lessee thereof upon lives, under a church lease,

(*d*) *Dale v. Lister*, 16 Ves. jun. 7, cited.

(*e*) *Milligan v. Cooke*, 16 Ves. jun. 1.

granted the lease in question, with covenants, binding his real and personal representatives to procure renewals to make the complete term sold. It appeared, however, that the covenant to renew was limited, and not binding to the extent mentioned, the estate being in settlement, and the covenants not general. The *purchaser* filed a bill for a specific performance, with an allowance. In effect the difference was between a covenant by the lessor binding all his assets real and personal, and a covenant which only bound that property which the lessor might permit to go from him to his son, who would be entitled to the property under the settlement. Lord Eldon felt great doubt whether that could be made the subject of a valuation. The purchaser, however, only desired an indemnity upon a real estate; or by part of the purchase money to be kept in Court, the sellers receiving the dividends. The Lord Chancellor decreed a specific performance, and directed an inquiry what was the difference between the value of the interest actually sold, and that represented, and such difference to be deducted from the purchase money; and if the Master should find that he was unable to ascertain such difference in value, or if the purchaser should choose to take the title with a sufficient indemnity, he might, and the decree was affirmed upon a rehearing.

But the general rule, independently of special circumstances, is, that the Court can neither compel a purchaser to take an indemnity nor a vendor to give it (*f*).

Although a purchaser may in most cases insist upon taking the interest which the vendor can give him, yet it seems that equity will not decree an under-lease on an agreement to assign, though it appear that the assignment cannot be made without a forfeiture; for the defendant, in agreeing to assign, might intend to discharge himself

(*f*) 1 Ves. & Beam. 225; *vide post*, ch. 7; Paton v. Brebner, 1 Bligh, 66.

from covenants to which he would continue liable by the under-lease (*g*). This is, however, a defence which a vendor can seldom set up against a purchaser's claim, where the purchaser chooses to accept an under-lease; for an assignee of a lease almost invariably covenants to indemnify his vendor from the rent and covenants in the lease, and from these covenants he cannot of course discharge himself by an assignment, any more than by an under-lease.

So it has been determined by Lord Redesdale, that where, at the time of the contract, the purchaser is fully aware that the vendor cannot execute the agreement, and, consequently, cannot enforce the performance of it; there the agreement must be presumed to have been executed under a mistake, and the purchaser cannot insist upon a performance as to the interest to which the vendor may be actually entitled (*h*).

And in a case where a tenant for life, with a power of leasing for twenty-one years at a rack-rent, agreed to execute a lease for twenty-one years, and a further lease for twenty-one years at any time during his life, consequently to execute a lease for twenty-one years, whatever might be the increased value of the property at the time the lease should be granted; Lord Redesdale considered it a contract to act in fraud of the power, and that the lessee was not entitled to a specific performance. To obviate this objection, the lessee offered to take a renewed lease for twenty-one years, if the lessor should so long live; but Lord Redesdale thought that this was one of those cases where the plaintiff had no right thus to qualify the contract he insisted upon: there was nothing in the case to show

(*g*) Anon. E. T. 1790; Fonbl n. (*r*), to 1 Trea. Eq. 211, 2d edit. See *Mason v. Corder*, 2 Marsh. 332.

(*h*) *Lawrenson v. Butler*, 1 Scho. & Lef. 13; see *Mortlock v. Buller*, 19 Ves. jun. 292.

that satisfaction in the form of damages was not an adequate remedy for him. If he had been put into a situation from which he could not extricate himself, the defendant might be called on to make the best title in his power, but nothing could be more mischievous than to permit a person who knows that another has only a limited power, to enter into a contract with that other person, which, if executed, would be a fraud on the power, and when that was objected to, to say, "I will take the best you can give me." A court of equity ought to say, to persons coming before it in such a way, "make the best of your case with a jury (*i*)."

It should be observed that there was another point in the above cause, and the decree was pronounced after considerable doubts. It seems difficult to reconcile the opinion expressed by Lord Redesdale with the current of authorities. It was not a necessary consequence of the contract that the lease agreed to be granted would be a fraud on the power, and the purchaser was willing to take the interest which the seller was enabled to grant without risk to himself or injury to the remainder-men.

If in a case of this nature, the purchaser, on the faith of the agreement, put himself in a situation from which he cannot extricate himself, and is therefore willing to forego a part of his agreement, that is a circumstance to induce a court of equity to give relief. Thus, in a case before Lord Thurlow, the incumbent of a living had, with full knowledge of the title, contracted with the tenant in tail, in remainder after a life estate, for the purchase of the advowson, and on the faith of that agreement had built a much better house than he would otherwise have done; the tenant for life would not join in suffering a recovery, and consequently a good title could not be made. Lord

(*i*) *Harnet v. Yielding*, 2 Scho. & Lef. 549; *vide supra*, p. 198.

Hurlow held, that as the purchaser had, upon the faith of the contract, built a good house on the glebe, he ought to have the utmost the vendor could give him; and therefore directed the vendor to convey a base fee, by levying a fine with a covenant to suffer a recovery whenever he should be enabled to do so by the death of the tenant for life (*k*).

If the vendor has granted a lease of the estate which is void by force of a statute, the Court will not, on the request of the purchaser, consider the lease as valid, and allow him a compensation in respect of it (*l*).

SECTION II.

Of Defects in the Quality of the Estate.

IN most cases on this head, the rule “*caveat emptor*” applies, and therefore, although there be defects in the estate, yet, if they are patent, the purchaser can have no relief (*m*).

Thus, where a meadow was sold without any notice of a footway round it, and also one across it, which of course lessened its value, Lord Rosslyn decreed a specific performance with costs, as *he could not*, he said, *help the purchaser who did not choose to inquire* (*n*). *It was not a latent defect.* Lord Manners has said, that he believed the bar was not very well satisfied with the decision, although, as he observed, the purchaser was undoubtedly extremely negligent not to look at the estate before he purchased it (*o*).

(*k*) Lord Bolingbroke’s case, cited 1 Scho. & Lef. 19, n. (*a*).

(*l*) Morris v. Preston, 7 Ves. jun. 547.

(*m*) See the introductory Chap-

ter; and see Lowndes v. Lane, 2 Cox, 363.

(*n*) Oldfield v. Round, 5 Ves. jun. 508.

(*o*) 1 Ball & Beatty, 250; and see Legge v. Croker, *ib.* 506.

So a description, that the land was uncommonly rich water meadow, was held to be immaterial, although the property was imperfectly watered. The Court thought that it would be straining the meaning of the words “ uncommonly rich water meadow land,” if it were not confined to the quality of the land ; and in that sense it professed to be nothing more than the loose opinion of the auctioneer or vendor as to the obvious quality of the land, upon which the vendee ought not to have placed, and could not be considered to have placed, any reliance (*p*).

And here a case (*q*) may be introduced, where the subject of the contract was a house on the north side of the River Thames, supposed to be in the county of Essex, but which turned out to be in Kent ; a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a churchwarden of Greenwich, when his object was to be a freeholder of Essex ; yet he was compelled to take the house.

This decision, however, seems to be opposed by a case before Lord Talbot. An agreement was entered into for the purchase of a house for a coffee-house. It was found that a chimney could not be made convenient for a coffee-house ; but nevertheless, the vendor filed a bill against the purchaser, to compel him to perform the agreement. Lord Talbot dismissed the bill, merely because the tenant would be obliged to take it for a purpose he did not want (*r*).

But it may be remarked, that it is no bar to a specific performance, that the conveyance will not have the operation which the vendor thought it would. Thus where a tenant for life of a copyhold purchased the réversion in the hope of extinguishing contingent remainders, and afterwards finding that the conveyance would not affect

(*p*) Scott v. Hanson, 1 Sim. 13.

(*r*) 1 Ves. 307 ; and see 13 Ves.

(*q*) Shirley v. Davies, in the jun. 78.

Exchequer, 6 Ves. jun. 678, citcd.

the remainders, brought a bill to be relieved against the security which he had given for the purchase money ; the Court gave him his option either to pay the principal, interest and costs, or to have his bill dismissed with costs (*s*).

So in a case where, under the *legal construction* of the terms of an agreement for a lease, the option to determine the lease was in the lessee only, and it was argued against a specific performance, that this was contrary to the intention, the Master of the Rolls said that a specific performance of a written agreement cannot be denied because the meaning of the parties does not appear (*t*).

But where a vendor gives a false description of the estate, the purchaser may at law rescind the contract. As if an estate is stated to be but one mile from a borough town, and it turns out to be between three and four, the contract is voidable by the purchaser (*u*). And the same rule must prevail in equity where the misdescription, as in this case, is not from the nature of it a subject of compensation.

So in a case where the estate was described to have lately undergone a thorough repair, whereas it was in a complete state of ruin, and ordered to be pulled down by the district surveyor, the purchaser was allowed to rescind the contract (*x*). And where the state of the repairs was falsely represented by the seller, knowing that the house had the dry-rot, without communicating that fact to the purchaser, upon a bill filed by the seller, a specific performance was decreed, with a compensation to the purchaser (*y*).

(*s*) *Mildmay v. Hungerford*, 2 Vern. 243.

(*t*) *Price v. Dyer*, MS., Rolls; S. C. 17 Ves. jun. 356.

(*u*) *Duke of Norfolk v Worthy*, 1 Camp. Ca. 337; *vide supra*, p. 38; and see *Fenton v. Browne*,

14 Ves. jun. 144; — *v. Christie*, 1 Salk. 28, by Evans; *Trower v. Newcombe*, 3 Mer. 704.

(*x*) *Loyes v. Rutherford*, K. B. 16 May 1809.

(*y*) *Grant v. Munt*, Coop. 173.

So where the purchaser of a leasehold house was aware of the ruinous state of the premises, but no mention was made at the sale by auction of a notice to repair given to the vendor by the lessor, on the day before the sale, under which the lessor re-entered and evicted the purchaser, he (the purchaser) was permitted to recover the deposit from the auctioneer, on the ground that in such transactions good faith was most essential, and the vendor or his agent was bound to communicate to the vendee, the fact of such notice (z).

But if the purchaser knew that the description was false, he cannot, it seems, take advantage of it either at law or in equity.

Thus, in a case before Sir William Grant (a), where an estate was described as being within a ring fence, it appeared, that the estate was intersected by other lands, and did not answer the description, but that the purchaser knew the situation of the estate; his Honor (after expressing a doubt whether such an objection was a subject of compensation, as it was not certain that a precise pecuniary value could be set upon the difference between a farm compact in a ring fence, and one scattered and dispersed with other lands), said, that the purchaser was clearly excluded from insisting upon that as an objection to complete the contract. He saw the farm before he purchased; he had lived in the neighbourhood all his life. This variance was the object of sense; he must have known whether the farm did lie in a ring fence or not; and upon the same ground, that the purchaser could not get rid of the contract on account of the difference in the description of the farm, his Honor determined he could not be entitled to compensation. If a compensation was given to him, he would get a double allowance; for if he had knowledge

(z) *Stevens v. Adamson*, 2 Stark. 422.

(a) *Dyer v. Hargrave*, 10 Ves. jun. 505.

that what he proposed to purchase did not answer the description, it must be taken that he bid so much the less.

This case, we observe, went a step farther than either the case before the Court of Exchequer, or that before Lord Rosslyn, in neither of which was there any warranty or false description. But in this case it was expressly stated, that the whole estate was within a ring fence; but the Master of the Rolls thought that circumstance immaterial, as the purchaser knew the description was false; and his Honor appears to have grounded his decision on the doctrine, that even at law a warranty is not binding where the defect is obvious, and put the cases of a horse with a visible defect, and a house without a roof or windows warranted as in perfect repair.

But where a particular description is given of the estate, which turns out to be false, and the purchaser cannot be proved to have had a distinct knowledge of the actual state of the subject of the contract, he will be entitled to a compensation, although he may be compelled to perform the contract.

Thus, in the case before the Master of the Rolls, the particular described the house as being in good repair, and the farm as consisting of arable and marsh land, in a high state of cultivation. It appeared, however, that the house was not in good repair, and that the land was not in a high state of cultivation. The judgment contains the facts of the case, and is highly satisfactory. His Honor said, "These objections are such as a man may have an indistinct knowledge of, and he may have some apprehension that, in those respects, the premises do not completely correspond with the description, and yet the description may not be so completely destroyed as to produce any great difference in his offer. As to the marsh land, it is very uncertain, whether, by any view, it was possible for him

to judge of that. It is stated by many witnesses, that the season of the year was just at the breaking of a frost, and represented that no man could, at that time, say whether the land was well or ill cultivated. So he may have seen some trifling defects in the house, and might not intend to make the objection, if they turned out to be nothing more than they appeared upon the surface. He might consider them too trivial, and not mean to claim compensation for an objection so insignificant. But afterwards, when he came to examine, according to this evidence, he discovered that the house was materially defective, and very much out of repair. Admitting that he might, by minute examination, make that discovery, he was not driven to that examination; the other party having taken upon him to make a representation: otherwise he would be exonerated from the consequence of that in every case where, by minute examination, the discovery could be made. The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe. This purchaser, therefore, is entitled to compensation for the defects of the house, and the cultivation of the marsh land."

But notwithstanding that the foregoing case has established, that the repairs necessary to a house are a subject of compensation, although the house is described to be in good repair, yet his Honor seemed to admit, that if the purchaser wanted possession of the house to live in at a given period, by which time the repairs could not be completed, he ought not to be bound to complete the contract (b).

Where the defect is a *latent* one, and the purchaser cannot by the greatest attention discover it, if the vendor be aware of it, and do not acquaint the purchaser with the fact, he may set aside the contract at law, although

(b) *Vide infra*, ch. 8.

he bought the estate *with all faults* (c); and equity will not enforce a specific performance (d).

This was decided at law by Lord Kenyon at *nisi prius*, upon the sale of a ship. It was insisted, for the seller, that the rule *caveat emptor* applied; but Lord Kenyon said, that there are certain moral duties, which philosophers have called duties of imperfect obligation, such as benevolence to the poor, and many others, which courts of law do not enforce. But in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith. This was a latent defect, which the plaintiffs could not, by any attention whatever, possibly discover; and which the defendants knowing of, ought to have disclosed to the plaintiffs. The terms to which the plaintiffs acceded, of taking the ship with all faults, and without warranty, must be understood to relate only to those faults which the plaintiffs could have discovered, or which the defendants were unacquainted with.

In a late case (e), the same point arose before Lord Ellenborough at *nisi prius*; but ultimately it was not necessary to decide it. Lord Kenyon's decision was cited. Lord Ellenborough said, that he could not subscribe to the doctrine of that case, although he felt the greatest respect for the authority of the Judge by whom it was decided. Where an article is sold *with all faults*, he (Lord Ellenborough) thought it was quite immaterial how many belonged to it within the knowledge of the seller, *unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser*. The very object of introducing such a stipulation is, to put the purchaser

(c) *Mellish v. Motteux*, Peake's Ca. 115.

(d) *Oldfield v. Round*, 5 Ves. jun. 508.

(e) *Baglehole v. Walters*, 3 Camp. Ca. 154. See 1 Ball & Beatty,

515.

on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent. A man may be possessed of a horse he knows to have many faults, and wish to get rid of him, for whatever sum he would fetch. He desires his servant to dispose of him; and, instead of giving a warranty of soundness, to sell him *with all faults*. Having thus laboriously freed himself from responsibility, is he to be liable, if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market when exposed to sale? By acceding to buy the horse with all faults, he takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives. It would be most inconvenient and unjust if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell. In a contract such as this, his Lordship thought there was no fraud, unless the seller, by positive means, renders it impossible for the purchaser to detect latent faults; and he made no doubt, that this would be held as law when the question should come to be deliberately discussed in any court of justice.

In a still later case, upon the sale of a ship, the particular stated, amongst other things, that the hull was nearly as good as when launched. And after stating when she was to be seen, added, “with all faults as they now lie.” Then followed an inventory of the stores, to which the following declaration was added, “the vessel and her stores to be taken with all faults as they now lie, without any allowance for weight, length, quality, *or any defect whatsoever*.” The ship was quite unseaworthy. She belonged to underwriters to whom she had been abandoned. The agents for the sale must have known her defects, and she was kept constantly afloat, so that her defects could

not be discovered. The person who framed the particular had not examined the vessel (*f*). Mansfield, C. J. said that these words were very large, to exclude the buyer from calling upon the seller for any defect in the thing sold, but if the seller was guilty of any positive fraud in the sale, these words will not protect him. There might be such fraud either in a false representation, or in using means to conceal such defect. He thought the particular was evidence here by way of representation, that states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, was this true or false? If false, it was a fraud, which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent says, that he framed this particular without knowing any thing of the matter. But it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false. But, besides this, it appears here, that means were taken fraudulently to conceal the defects in the ship's bottom. These must have been known to the captain, who was to be considered the agent of the owners, and he evidently, to prevent their being discovered by persons disposed to bid for her, removed her from the ways where she lay dry, and kept her afloat in the dock till the sale was over. Therefore, consistently with the decided cases upon this subject, the learned Judge was of opinion, that the purchaser was entitled to recover back his deposit.

In a case which occurred a few months before, upon the sale of a ship, where the Court held that, in point of

fact, there was no fraud, Mr. Justice Heath said, that the meaning of selling "with all faults" is, that the purchaser shall make use of his eyes and understanding to discover what faults there are. He admitted that the vendor was not to make use of any fraud or practice to conceal faults. The learned Judge adhered to the doctrine of Lord Ellenborough, above stated, without any difficulty. Mr. Justice Chambre held, there must be evidence of fraud to enable the Court to depart from the written agreement. Mr. Justice Gibbs agreed with Lord Ellenborough's doctrine. Even if there had been a representation it would not have availed. He held, that if a man brought him a horse, and made any representation whatever of his quality and soundness, and afterwards they agreed in writing for the purchase of the horse, that shortened and corrected the representations, and whatsoever terms were not contained in the contract would not bind the seller. But the learned Judge agreed that *fraud* would not be done away by the contract, and he mentioned the case of a sale of a house, where the seller being conscious of a defect in a main wall, plastered it up and papered it over, and it was held, that as the seller had expressly concealed it, the purchaser might recover (g). As the law now stands, unless there be actual fraud, the written contract cannot be avoided.

But the ground and basis of an action in a case of this nature, for recovery of a deposit, where the contract is *in fieri*; or of damages, where the contract is actually executed, is the *scienter*; and, therefore, if the vendor was not aware of the defect, he will not be answerable for it. Nor will trifling defects be sufficient foundation for such an action.

(g) *Pickering v. Dowson*, 4 *ib.* 847; *Shepherd v. Kain*, 5 *Barn. Taunt.* 779. See *Jones v. Bowden*, & *Ald.* 240.

Thus, in a case (*h*) where a purchaser brought an action against a vendor, to recover damages for having sold him a house, knowing it had the dry-rot; it appeared, that the house was situated in a clayey soil, and that the floor lay near the ground, by which some of the timbers had rotted; but the vendor was not aware of the defects, and the purchaser was nonsuited. Lord Kenyon said, the circumstances that had been proved in this case might be described by a word that was used by one of the witnesses; they were mere *baguettes*. If these small circumstances were to be the foundation of an action, every house that was sold would produce an action. If a broken pane of glass that might be found in a garret window, perhaps, had not been described by the seller, it would be the ground of an action. If he was to consider himself as a witness in the cause, he could say he had met with something of this kind, and he never thought himself imposed upon, because now and then some rotten boards and rotten joists might be found about a house. Besides, there was no imposition, no *mala fides* in this case.

Although the purchaser might, with proper precaution, have discovered the defect; yet if, during the treaty, the vendor *industriously* conceal the fact, equity will not assist him.

Thus, upon a suit for a specific performance, the defence was, that the estate was represented to the defendant as clearing a net value of 90 *l.* per annum, and no notice was taken to him of the necessary repair of a wall to protect the estate from the River Thames, which would be an out-going of 50 *l.* per annum. And it appearing, upon evidence, that there had been an *industrious concealment* of the circumstances of the wall during the treaty, the Lord Chancellor dismissed the bill, but without costs (*i*).

(*h*) *Bowles v. Atkinson*, N. P. MS.

(*i*) *Shirley v. Stratton*, 1 Bro. C. C. 440.

And here a case may be mentioned, where an estate appeared to be subject to a right of entry to dig for mines; the *purchaser* did not object to the title on this ground, but insisted upon a specific performance with a compensation, which was accordingly decreed (*k*).

SECTION III.

Of Defects in the Quantity of the Estate.

If a purchaser of an estate thinks he has purchased *bonâ fide* a part which the vendor thinks he has not sold, that is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say, one shall be forced to give that price for part only which he intended to give for the whole; or that the other shall be obliged to sell the whole for what he intended to be the price of part only (*l*). Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine he was buying any more than the seller imagined he was selling the part in question, then a pretence to have the whole conveyed is as contrary to good faith on his side, as a refusal to sell would be in the other case (*m*).

If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey (*n*).

(*k*) *Seaman v. Vawdrey*, 16 Ves. jun. 390.

(*l*) See 13 Ves. jun. 427; and see *Higginson v. Clowes*, 15 Ves. jun. 516, stated, as to this point, *supra*, p. 33.

(*m*) *Per* Lord Thurlow. See 1 Ves. jun. 211; and see 6 Ves. jun. 339.

(*n*) *Sir Cloudesley Shovel v. Bogan*, 2 Eq. Ca. Abr. 688, pl. 1.

The rule is the same, though the land is neither bought nor sold professedly by the acre ; the presumption is, that in fixing the price, regard was had on both sides to the quantity which both suppose the estate to consist of. The demand of the vendor, and the offer of the purchaser, are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain. The general rule therefore is, that where a misrepresentation is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement out of the purchase-money, for so much as the quantity falls short of the representation(o).

But where the lands in a conveyance are mentioned to contain so many acres *by estimation*, or the words “ more or less ” are added, if there be a small portion more than the quantity, the vendor cannot recover it ; and if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency(p). Indeed, a case is said to have been decided, where a man conveyed his land by the quantity of one hundred acres, were it more or less, and it was not above sixty acres ; but the purchaser had no relief, because it was his own laches(q).

That however was the case of an actual conveyance. Where the contract rests *in fieri*, the general opinion has been that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words *more or less*, or *by estimation*(r).

(o) Hill v. Buckley, 17 Ves. 394,
per Sir William Grant.

(p) Twyford v. Warcup, Finch,
310. See Marquis of Townshend
v. Stangroom, 6 Ves. jun. 328 ;

Rushworth's case, Clay. 46 ; Neale
v. Parkin, 1 Esp. Ca. 229.

(q) Anon. 2 Freem. 106.

(r) Hill v. Buckley, 17 Ves.

394.

But in a case where the estate was stated to contain *by estimation* forty-one acres, *be the same more or less*; and upon an admeasurement, the quantity proved to be only between thirty-five and thirty-six acres; and the purchaser claimed an abatement: the Master of the Rolls decided against the claim. His Honor said, that the effect of the words “more or less” added to the statement of quantity had never been yet absolutely fixed by decision; being considered sometimes as intending to cover only a small difference the one way or the other; sometimes as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it. In this instance, the description was rendered still more loose by the addition of the words “by estimation.” The estimated extent of ground frequently proves quite different from its contents by actual admeasurement. It cannot be contended that the terms “estimated” and “measured” have the same meaning. If a man was told that a piece of land was never measured, but was estimated to contain forty-one acres, would that representation be falsified by showing that, when measured, it did not contain the specified number of acres? The only contradiction to that proposition would be, that it had not been estimated to contain so much (*s*).

The case of *Day v. Finn* (*t*), however, seems a considerable authority, that at least the words *more or less* ought only to clear a small deficiency where the contract rests *in fieri*. There, in ejectment, the plaintiff declared on a lease for years of a house, and thirty acres of land in *D.*; and that *J. S.* did let to him the said messuage and thirty acres, by the name of his house in *B.*, and ten acres

(*s*) *Winch v. Winchester*, 1 Ves. & Beam. 375.

(*t*) *Owen*, 133; and see the cases cited above.

of land there, *sive plus sive minus* : it was moved in arrest of judgment ; because that thirty acres cannot pass by the name of ten acres, *sive plus sive minus* ; and so the plaintiff had not conveyed to him thirty acres, for when ten acres are leased to him *sive plus sive minus*, these words ought to have a reasonable construction to pass a reasonable quantity, either more or less, and not twenty or thirty acres more. Yelverton agreed, for the word ten acres, *sive plus sive minus*, ought to be intended of a reasonable quantity, more or less, by a quarter of an acre, or two or three at most ; but if it be three acres less than ten, the lessee must be contented with it. *Quod* Fenner and Crook *concesserunt*, and judgment was stayed.

And upon a motion in *Portman v. Mill* (u), it appeared that the lands were described as containing, by estimation, 349 acres, or thereabouts, be the same, more or less, and the agreement stipulated that the parties should not be answerable for any excess or deficiency in the quantity of the premises, but that the premises should be taken by the purchaser at the quantity, whether more or less ; and the actual number of statute acres was less by 100 acres than the number stated in the contract. Lord Eldon said, that as to this stipulation, he never could agree that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as was alleged to exist there.

But however the rule may be finally settled, yet a seller knowing the true quantity, would not be allowed to practise a fraud, by stating a false quantity, with the addition of the words “ more or less,” or the like (x).

If an estate be represented as containing a given quantity, although not professedly sold by the acre, the circum-

(u) 2 Russ. 570.

Worthy, 1 Camp. Ca. 337 ; *supra*,

(x) See *Duke of Norfolk v.* p. 38, and 1 Ves. & Beam. 377.

stance that the purchaser was intimately acquainted with the estate, would not necessarily imply knowledge of its exact contents ; while a particular statement of the quantity would naturally convey the notion of actual admeasurement : and therefore the Court would not be warranted in inferring that the purchaser knew the real quantity (*y*). For, if the purchaser did know the real quantity, of course he could not claim any allowance for the deficiency.

In a late case (*z*), the agreement was to sell an estate “ containing the several quantities after mentioned, that is to say, by the plan drawn by Mr. *F.* in 1792 ;” the agreement then proceeded to state the numbers and particular quantities of *each close*, and then proceeded to add, “ containing altogether *about* 101^a. 3^r 29^p.” There was a deficiency of 2^a. in two closes which together were stated to contain 8^a. 1^r. 4^p. It was held that the purchaser was entitled to an abatement, as the quantity of each close was particularly specified.

The principle upon which an abatement in these cases is made, is, to place the parties in the situation in which they would have stood, if there had been no misrepresentation. Therefore, where a man purchased a wood, which was, by mistake, represented to contain nearly twenty-six acres more than it did, but the purchaser was, in the course of the negotiation, furnished with the value of the woods *quâ* wood, so that he obtained the right quantity of wood but not of soil, the abatement was decreed to be only so much as soil covered with wood would be worth, after deducting the value of the wood (*a*).

Where lands are shown to a purchaser as part of his purchase, he will be entitled to them, although expressly

(*y*) *Winch v. Winchester*, 1 Ves. & Beam. 375.

(*z*) *Gell v. Watson*, 16 Nov. 1825, MS.

(*a*) *Hill v. Buckley*, 17 Ves. jun. 394.

excepted in his conveyance by name, provided he did not know them by that name (*b*).

So if a man purchase an estate by a particular, and in the conveyance part of the land is left out, equity will relieve him (*c*); but it must be clear that he did purchase by the particular, because it is not a writing within the statute of frauds; and, therefore, unless that be the case, or the agreement can be otherwise proved, the Court cannot relieve (*d*).

On the other hand, the Court will equally relieve a vendor, where more land has passed than was contracted for; although in an early case (*e*) (1) this relief was denied; because the defendant was a purchaser upon valuable consideration. But it is now clear, that if land be expressly conveyed, or pass by general words, which was not mentioned in the particular by which the purchase was made, or was not intended to be conveyed, the purchaser will be decreed to re-convey it (*f*).

And where a purchaser took a conveyance of an estate from his own instructions, he was held not to be entitled to lands answering the general description in the advertisements of sale, but which were not included in his conveyance, nor in a more particular description from which he prepared his instructions (*g*).

To come to a right conclusion on this branch of our

(*b*) *Oxwick v. Brockett*, 1 Eq. *supra*; and 2 Dow, 301.
Ca. Abr. 355, pl. 5.

(*c*) *Prec. Cha.* 307, *arguendo*; and see *Nelson v. Nelson*, Nels. Cha. Rep. 7.

(*d*) *Cass v. Waterhouse*, *Prec. Cha.* 29. See *Clinan v. Cooke*, 1 Scho. & Lef. 22; and see ch. 3,

(*e*) *Clifford v. Laughton*, Toth. 83.

(*f*) *Tyler v. Beversham*, Rep. *temp.* Finch, 80; 2 Ch. Ca. 195. See *Gibson v. Smith*, Barnard. Ch. Ca. 491.

(*g*) *Calverley v. Williams*, 1 Ves. jun. 210.

(1) Probably the defendant had purchased without notice from the first purchaser.

subject, we must be informed that an acre does not always contain the same superficial quantity of land. The word acre at first denoted, not a determined quantity of land, but any open ground or field. It afterwards signified a measured portion of land, but the quantity varied, and was not fixed until the statute (I) *de terris mensurandis* (h), according to which an acre contains one hundred and sixty square perches; so that every acre is a superficies of forty perches long, and four broad; or in that proportion, be the length or breadth more or less. The length of the perch was, previously to the statute of Edward, fixed at five yards and a half, or sixteen feet and a half, by the statute called *compositio ulnarum et perticarum* (i), and the act of Edward must of course be construed with reference to this standard. Lord Kenyon seems to have thought it impossible to contend, that a custom should prevail that a less space of ground than an acre should be called an acre (k); but in several places the perch is measured with rods of different lengths, and notwithstanding Lord Kenyon's *dictum*, *consuetudo loci est observanda* (l), so that a greater or less space of ground than a statute acre may, in compliance with the custom of the place where the land lies, be called an acre. In some places the perch is measured by a rod of twenty-four feet, in

(h) 33 Edw. I.; and see 24 H. VIII. c. 4; 2 Inst. 737; Co. Litt. 69 a; Spelm. Gloss. v. *Acra*, *particata terræ*, *pertica*, *pes forestæ*, *roda terræ*. Cow. Interp. v. Acre.

(i) See 4 Inst. 274.

(k) Noble v. Durell, 3 T. Rep. 271; and see Hockin v. Cooke, 4 T. Rep. 314; Master of St. Cross v. Lord Howard de Walden, 6 T. Rep. 338.

(l) 6 Rep. 67 a.

(I) It was formerly holden not to be a statute, but only an ordinance. Stowe's case, Cro. Jac. 603; but this has since been overruled. Rex v. Everard, 1 Lord Raym. 638.

some by one of twenty feet (*m*), and in others by one of sixteen feet (*n*). And we are now to inquire in what cases the custom of the country in this respect shall or shall not prevail.

In adversary writs the number of acres are accounted according to the statute measure (*o*), but in fines, and common recoveries, which are had by agreement and consent of parties, the acres of land are according to the customary and usual measure of the country, and not according to the statute (*p*).

So, which is more to our present purpose, where a man agrees to convey (*q*), or actually conveys (*r*) any given number of acres of land, which are known by estimations or limits, there the acres shall be taken according to the estimation of the country where the land lies, be they more or less than the measure limited by the statute; for they pass as they are there known, and not according to the measure by statute.

But if a man possessed of a close containing twenty acres of land by estimation, which is not eighteen, grant ten acres of the same land to another, there the grantee shall have ten acres according to the measure fixed by the statute, because the acres of such a close are not known by parcels, or metes and bounds, and so this case

(*m*) Crompt. on Courts, 222, who cites a case in the Exchequer, related to him by one of the Barons; and also 47 E. III. [fo. 18 a, pl. 35;] and see Barksdale v. Morgan, 4 Mod. 185.

(*n*) Co. Litt. 3 b. See Dalt. c. 112, s. 25.

(*o*) Andrew's case, Cro. Eliz. 476, cited.

(*p*) Sir John Bruyn's case, 6 Co. 67 a, cited; Waddy v. Newton,

8 Mod. 276. See Floyd v. Bethill, 1 Roll. Rep. 420, pl. 8; and see Treswallen v. Penhules, 2 Rolle's Rep. 66; 12 Vin. 240.

(*q*) Some v. Taylor, Cro. Eliz. 665.

(*r*) 47 E. III. 18 a, pl. 35; 6 Co. 67 a; Morgan v. Tedcastle, Poph. 55; Floyd v. Bethill, 1 Rolle's Rep. 420, pl. 8; Andrew's case, Cro. Eliz. 476, cited.

differs from the one immediately preceding it(*s*). And it is said, that if one sells land, and is obliged that it contain twenty acres, the acres shall be taken according to the law, and not according to the custom of the country (*t*).

But the law upon this subject is altered by an Act of the 5th of the present King, intituled, “An Act for ascertaining and establishing Uniformity of Weights and Measures.” After providing that(*u*) the straight line or distance between the centres of the two points in the gold studs in the straight brass rod now in the custody of the clerk of the House of Commons, whereon the words and figures, “standard yard, 1760,” are engraved, shall be the original and genuine standard of that measure of length or lineal extension called a yard; and that all measures of length shall be taken in parts or multiples, or certain proportions of the said standard yard; and that one third part of the said standard yard shall be a foot, and the twelfth part of such foot shall be an inch; *and that the pole or perch in length shall contain five such yards and a half*, it enacts, that (*x*) all superficial measure shall be computed and ascertained by the said standard yard, or by certain parts, multiples or proportions thereof; and that the rood of land shall contain 1,210 square yards according to the said standard yard; and that the acre of land shall contain 4,840 such square yards, being 160 square perches, poles or rods; and that (*y*) from and after the 1st day of May 1825, all contracts, bargains, sales and dealings which shall be made or had within any part of the United Kingdom of Great Britain and Ireland, for any goods, wares, merchandise, or other thing to be sold, delivered, done or agreed for by measure, where no spe-

(*s*) Morgan v. Tedcastle, Poph. 55.

(*t*) Wing v. Earle, Cro. Eliz. 267.

(*u*) S. 1, c. 74.

(*x*) S. 2.

(*y*) S. 15.

cial agreement shall be made to the contrary, shall be deemed, taken and construed to be made and had according to the standard measures ascertained by this Act ; and in all cases where any special agreement shall be made with reference to any measure established by local custom, the ratio or proportion which every such local measure shall bear to any of the said standard measures shall be expressed, declared and specified in such agreement, or otherwise such agreement shall be null and void : and it is then enacted that (z) the several statutes, ordinances, and acts and parts of the several statutes, ordinances and acts thereafter mentioned and specified, so far as the same relate to the ascertaining or establishing any standards of measures, or to the establishing or recognizing certain differences between measures of the same denomination, shall from and after the 1st day of May 1825, be repealed ; and the enumeration included the statutes or ordinances before mentioned in this section.

(z) S. 23, see 6 Geo. IV. c. 12.

CHAPTER VII.

OF THE TITLE WHICH A PURCHASER MAY REQUIRE.

I. A PURCHASER has a right to require a title commencing at least sixty years previously to the time of his purchase; because the statute of limitations (*a*) (I) could not in a shorter period confer a title. In *Paine v. Meller* (*b*), Lord Eldon seemed to be of opinion, that an abstract not going farther back than forty-three years, was a serious objection to the title.

Even sixty years are not sometimes sufficient. For instance, if it may reasonably be presumed from the contents of the abstract, that estates-tail were subsisting, the purchaser may demand the production of the prior title. The statutes of limitation cannot in such case be relied on; remainder-men having distinct and successive rights, upon which at least the statute of James can only begin to operate as they fall into possession. It may be thought even in the common case of a man claiming by descent, a reversion expectant upon particular estates created by his ancestor's will, that a writ of right will not lie after sixty years from his ancestor's death, although the particular estates have but recently determined. But however this may be, the objection still remains, for an ejectment may

(*a*) 32 Hen. VIII. c. 2; 21 Jac. I. c. 16. *Vide post*; and see *Barnwell v. Harris*, 1 Taunt. 430. (*b*) 6 Ves. jun. 349. See *Robinson v. Elliott*, 1 Russ. 599.

(I) The Courts however are so anxious to protect a long possession, that no plaintiff is entitled to so little favour as a plaintiff in a writ of right. See *Charlwood v. Morgan*, *Baylis v. Manning*, 1 New Rep. 64, 233; *Maidment v. Jukes*, 2 New Rep. 429.

OF THE TITLE WHICH A PURCHASER MAY REQUIRE. 305
be brought at any time within twenty years after the estate falls into possession.

So, if an abstract begin with a conveyance by a person who is stated to be heir at law of any person, the purchaser may require proof of the ancestor's intestacy.

To pursue this point is, in this place, impracticable, so numerous are the cases in which counsel are compelled to require the production of the prior title.

Of course a purchaser may, after notice of a defect in the title, by his conduct wave the objection ; but Lord Eldon has determined, that where an abstract is laid before counsel, who approves the title, his approbation is not to be taken as against the person consulting him, as a waiver of all reasonable objections. The Court cannot compel a specific performance upon the ground of an opinion which it may think wrong. The purchaser may either take an opinion from some other counsel, or the one first consulted may correct his error in a further opinion (c). This, it may be observed, was always the understanding of the Profession.

The right to a good title is a right not growing out of the agreement between the parties, but which is given by law. A purchaser, therefore, may wave his right, by concluding an agreement after he has full notice that he is not to expect a title beyond a limited period. That may be matter of notice and not of contract (d). And the vendor may of course stipulate that the purchaser shall accept the title such as it is (e).

II. Under this head we must consider the much agitated point, whether a purchaser of a leasehold estate can insist upon the production of the lessor's title.

(c) *Deverell v. Lord Bolton*,

(e) *Wilmot v. Wilkinson*, 6 Barn.

The general practice of the Profession is to call for an abstract of the title, but a lessee is not often able to comply with the demand. At the time the lease is granted, the title is rarely investigated, or even thought of; and a lessor cannot be advised voluntarily to submit his title to the examination of strangers. As my Lord Eldon remarked (*f*), the Newcastle case is a good lesson upon this subject of production. The corporation produced their charters to satisfy curiosity; some persons got hold of them, and the consequence was, the corporation lost 7,000 *l.* a year.

The numerous cases in the books where lessees, and persons claiming under them, have been evicted on account of defects in the titles of their lessors, strongly evince the danger of taking a lease without investigating the landlord's title. No title can be depended upon, however long the estate may have been in the same family. There may be a defect in a settlement, or the person in possession may have a partial estate only, with a power of leasing. All the leases of the Pulteney estate were set aside on account of a power of leasing not having been duly pursued: nor is this the only estate of which the leases have been vacated. Besides, without an abstract of the title, a purchaser cannot even ascertain that the lessor had not mortgaged the estate previously to granting the lease, in which case (as against the mortgagee) the lessee, and consequently any purchaser from him, would be a mere tenant at will (*g*); and his only remedy would be either to redeem the mortgage, or to bring an action on the lessor's covenant for quiet enjoyment.

A lessee is a purchaser *pro tanto*, and it should therefore seem that *he* is not only entitled to call upon the lessor for

(*f*) 8 Ves. jun. 141.

(*g*) Keech v. Hall, Dougl. 21.

an inspection of his title, but would not meet with any favour if he neglected to do so ; for no one's misfortune is so much slighted by the courts as his, who buys a thing in the realty, and does not look into the title (*h*). In *Keech v. Hall* (*i*), Lord Mansfield appears to have taken it for granted, that a lessee has a right to examine the title deeds. The case of *Gwillim v. Stone* (*k*), seems to lean the other way, although there, the plaintiff seems to have mistaken his remedy, and the decision in effect only was, that a man entering under an agreement for a lease, before the lease is granted, cannot call upon the other party to reimburse him his loss in case a title cannot be made : although certainly Mr. Justice Lawrence appears to have thought, that the mere agreement to grant the lease did not warrant an implied agreement to make a good title, or to deliver an abstract.

In a later case (*l*), Gibbs, C. J. thought at *nisi prius*, that the defendant was not bound to deliver an abstract under a bare agreement to grant a lease for twenty-one years ; and Mr. Justice Heath, after instancing the case of leases for three lives, granted some years since in Devonshire, by a Duchess of Bolton, who was mere tenant for life, but assumed to have a power of leasing, and received fines to the amount of 29,000 *l.* observed, that nevertheless it had never yet been heard of, that a tenant for life was asked to show his title to lease. The instance quoted shows the strong necessity of the title being produced ; and there is no instance in which a man acting under good advice, accepts a title from a tenant for life, without the production of the settlement under which he claims. However, in this case, the Court considered

(*h*) See *Roswel v. Vaughan*, *Cro. Jac.* 196 ; and *Lysney v. Selby*, 2 *Lord Raym.* 1118. *v. Mackreth*, *Forr. Ex. Rep.* 129 ; 11 *Ves. jun.* 343.

(*k*) 3 *Taunt.* 433.

(*i*) *Dougl.* 21 ; and see *Waring*

(*l*) *Temple v. Brown*, 6 *Taunt.* 60.

that the cause originated in a dispute between the two attornies, and the Judges expressed their desire not to decide the point, without affording an opportunity for a review of their judgment. But in the later case of Rosser v. Coombs (*m*), where the agreement was to grant a lease for a large premium, the contract was considered to be for the *sale* of a lease, and as the intended lessor had no right to grant it, the other party was allowed to recover back his deposit.

In the last case on this subject, in equity, where the agreement was made to take a lease for twenty-one years at rack rent, the Master of the Rolls decided, that the intended lessor, *who was plaintiff*, could not enforce a specific performance, without producing the original lessor's title (*n*). But it still remains undecided, whether a *lessee* can, as plaintiff, call for the original lessor's title.

The argument generally urged against the purchaser's right to call for the lessor's title is, that a lessee is seldom able to produce the title; and, therefore, on the ground of convenience, a purchaser must be presumed to know this circumstance, and to buy, subject to an implied condition, not to call for the freehold title. But the answer to this is, that the lessor's title is now generally required; and where the vendor cannot produce the title, it is usual to state the facts in the particular or agreement. Therefore, where that statement is omitted, it is fair to presume that the vendor is in possession of the title. There can be no inconvenience in establishing the purchaser's right to call for the freehold title; for the vendor has it in his power to prevent the claim by an express stipulation.

Of course, if a vendor of a leasehold estate be unable to procure the lessor's title, equity cannot assist the pur-

(*m*) 6 Barn. & Cress. 534.

424; Lord Ossulston v. Deverell,

(*n*) Fildes v. Hooker, 2 Mer.

26 May 1818, MS.

chaser (o), unless he will dispense with the production of the title to the freehold.

The question under consideration arose in a recent case in the Court of Chancery ; and Lord Eldon avoided deciding the abstract point, although he certainly appears to have thought that the better rule would be, that the purchaser is, in the absence of an express stipulation to the contrary, entitled to the production of the lessor's title. He intimated, however, that if ever it should be his duty to decide a question so important, he would call in the Judges to his assistance.

The case before Lord Eldon has decided that the vendor cannot demand a specific performance if the purchaser can show that the title to the freehold is not good, or that there are any incumbrances on it ; nor will equity afford its aid against the purchaser, where the nature of the leasehold title is misrepresented. The facts were these : the interest was described as fifty years, the residue of a term free from incumbrances, whereas it appeared that there were only sixteen years to come of the old lease, granted by Sir Richard Grosvenor in 1722, and the residue of the fifty years was granted by the trustees of Lord Grosvenor in 1791, as a reversionary term for thirty-four years. It appeared, that in 1785, the estate in question was charged with jointures, mortgages, &c. Lord Eldon held, that in these cases a purchaser should at least know accurately what he is buying ; that in the case before him, the title produced did not correspond with that contracted for ; and that there was a wide difference between the residue of a lease that has existed for a century with possession under it, and a small residue of an old term, and a reversionary lease granted by persons whose title from the first lessor is not deduced. He

(o) *Vide supra*, p. 198.

also thought that he was bound to look at the incumbrances, and therefore dismissed the bill, but without costs (*p*).

And, as we have seen, in the later case of *Fildes v. Hooker*, it was determined generally, that a lessee cannot, as *plaintiff*, require a specific performance, without showing a good title to the freehold.

And this authority was followed in the case of *Purvis v. Rayer*(*q*) in the Exchequer. An agreement was entered into on the 15th May 1819, between John Goldsborough Ravenshaw (as the agent of Purvis) of the one part, and William Rayer of the other part; whereby Ravenshaw agreed to sell, and Rayer agreed to purchase a house in Bath, held for the remainder of a term of years under the corporation of Bath and the late Richard Atwood, at the sum of 1,500*l.*; an abstract to be made and delivered by Purvis, and the assignment to be at the expense of Rayer. The purchase-money to be paid on or before Midsummer, when the deeds were to be signed. The ground-rent and all out-goings to Midsummer to be paid by Purvis, from whence the same were to be paid by Rayer. The bill was filed by the seller, and the title was referred to the Master, who reported that the plaintiff could not make a good title to the said leasehold premises. The report was grounded on the non-production of the lessor's title. The plaintiff excepted to the report. The Chief Baron overruled the exception. His Lordship

(*p*) *White v. Foljambe*, 11 Ves. jun. 337; *Deverell v. Lord Bolton*, 18 Ves. 505; and see *Radcliffe v. Warrington*, 12 Ves. jun. 326; *Lady Saltoun v. Philips*, sittings after T. T. 1813, cor. Lord Ellenborough, where a purchaser recovered his deposit, because the seller claimed his lease subject to Lord

Grosvenor's incumbrances, and had stated that the lease was only subject to the ground-rent, although he had not undertaken to produce the landlord's title. See 9 Price, 515.

(*q*) 28 July 1821, MS.; S. C. 9 Price, 488.

observed that the question was, whether, when a man sells a leasehold estate, he could compel the purchaser to take it without showing him his title. *White v. Foljambe* was the first case on this point. There was no case that went the length of showing that a lessor is not bound to show his title. This was a lease from a corporation ; and the general rule is, that where a vendor offers any thing for sale, the vendee is entitled to have the thing he buys with a moral certainty that he has the thing he buys. If a man sell an inheritance, he must show a title to the inheritance : so if a life estate. Then what is the difference where a lease is sold ? It is said, however, that this is an anomalous case ; but the law has not said so, nor has it been so considered in any of the decided cases. Then it is objected, that a lessor has not the means of compelling the inspection of his lessor's title ; that is true, but furnishes no ground for an exception. A lessee may insist on looking into his lessor's title, or that he should produce it ; but if he omits to do so, is that any reason why the vendee of a lease should be deprived of those advantages ? Another course is, to state in the advertisement that you cannot show the title. Therefore, though after the lease is granted the lessee cannot compel the production of his lessor's title, there is no reason why the vendee should be put to any risk. Then is there a good title here ; the lease is made in 1774 ; does the length of time make the lease good ? Suppose it had been made by a tenant for life ; a tenant for life might live for forty-five years, forty-five years possession would not be good evidence of a title to the inheritance ; but then it is said, this was a lease by a corporation. His Lordship was of opinion that there might be circumstances which might make an alteration ; but here there was no act of ownership prior to 1774, no prior leases. A tenant for life

also thought that he was bound to produce the original lease and all the mesne assignments, and therefore the costs (*p*).

And, as we have seen in *Hooker*, it was decided that a plaintiff recovering a good title

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incorporation, but on the other hand, if the lease would cease. This is from the case of a lease

if a leasehold estate had notice, at the time of the contract for purchase, of the existence of the lessor's title, he would be allowed to insist on its production.

And, therefore, a vendor of a leasehold estate has no right to insist on the production of the lessor's title, this circumstance being mentioned in the particulars of sale, if sold by public auction, or in the agreement, if sold by private contract. But a purchaser of an estate held under a bishop's lease, cannot call for the lessor's title (*r*).

It seems formerly to have been thought, that a plaintiff in an ejectment for a leasehold estate, could not recover unless the original lease and all the mesne assignments were proved; but this rule has been relaxed, and where the possession had been uniform, the jury will be recommended to presume any old assignments which have been lost (*s*). It cannot, however, be laid down as a general rule, that a purchaser of a leasehold estate can safely accept the title where any of the mesne assignments have been lost, although he might be able to recover in ejectment, if he actually did purchase. Every case of this nature must depend upon its own particular circumstances (*t*).

With respect to the title to renewable leaseholds, great difficulty constantly occurs. All public bodies who grant renewable leases, require the old lease to be given up before they will grant a new one; and when they once obtain

(*r*) *Fane v. Spencer*, 2 Mer. 430.

(*s*) *Earl v. Baxter*, 2 Blackst. 1228. See 11 Ves. jun. 350.

(*t*) *Vide post. Hillary v. Waller*.

of a surrendered lease, they will not part with a copy of it to be taken. When the lessee sells, an abstract of the subsisting lease and subinstruments. Now this is a title which it is impossible to accept, however willing the purchaser may be, and although he may have waved calling for the lessor's title. Every lease is stated to be granted in consideration of the surrender of the former lease, and by means of this reference the chain of title is kept up. The reference in the last lease to the one immediately preceding, is notice of it to the purchaser, and that again is notice of the one before that, and so on to the first lease. And if in any of these cases the lessee is described as devisee under a will, or there is any thing to lead the mind to a conclusion that the lessee is not absolutely entitled, the purchaser will be liable to the same equity as the lessee was subject to, although he, the purchaser, had no other knowledge of the fact, than the mention in the lease of the surrender of the former lease, equity deeming that sufficient to lead him to inquire into the title (*u*). Harsh as this rule may seem, it is quite consistent with the general principles of equity, and is imperiously called for in this case, because public bodies generally renew with the person having the legal estate, and seldom suffer any trusts to appear on the lease, lest they should be implicated in the execution of them.

Although a purchaser buys with full notice that a title cannot be made without the consent of a third person, yet it lies on the seller and not on the purchaser to obtain the consent. It cannot be inferred that the seller only agreed to part with his interest in the estate as far as he was able to do so (*x*).

(*u*) *Coppin v. Fernyhough*, 2 Bro. C. C. 291. 249; *Mason v. Corder*, 2 Marsh. 332; 7 Taunt. 9.

(*x*) *Lloyd v. Crispe*, 5 Taunt.

III. To enable equity to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from suspicion (*y*); for it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him (*z*). It hath, therefore, become a settled and invariable rule, that a purchaser shall not be compelled to accept a doubtful title (*a*); neither will he be forced to take an equitable title (*b*); nor will a case be directed to the Judges as to the title, unless the purchaser be willing that it should (*c*); and even if a case should be directed, and the Judges were to certify in favour of the title, yet a specific performance would not be decreed unless the Court itself were satisfied of the equitable as well as the legal title of the vendor (*d*). And although the Judges certify in favour of the title, and there is no equitable objection to it, yet if the point of law is very doubtful, the purchaser may require another case to be directed, which it seems will not be sent back to the same court (*e*).

And even the House of Lords, sitting as a court of equity upon appeal, will not in all cases decide the point, but if they think it a doubtful one will discharge the purchaser from the contract, with costs (*f*). It is, how-

(*y*) See 2 Ves. 59.

(*z*) Heath v. Heath, 1 Bro. C.C. 147.

(*a*) Marlow v. Smith, 2 P. Wms. 198; Mitchel v. Neale, 2 Ves. 679; Shapland v. Smith, 1 Bro. C. C. 74; Cooper v. Denne, 4 Bro. C.C. 80; 1 Ves. jun. 565, S. C.; Crewe v. Dicken, 4 Ves. jun. 97; Rose v. Calland, 5 Ves. jun. 186; Roake v. Kidd, *ibid.* 647; Wheate v. Hall, 17 Ves. jun. 80; Sloper v. Fish, Rolls, 29 July 1813; 2 Ves. &

Bea. 145; Jervoise v. Duke of Northumberland, 1 Jac. & Walk. 559; Price v. Strange, 6 Madd. 159.

(*b*) Cooper v. Denne, *ubi sup.*; and see 2 Ves. jun. 100; and *infra*.

(*c*) Roake v. Kidd, *ubi sup.*

(*d*) Sheffield v. Lord Mulgrave, 2 Ves. jun. 526.

(*e*) Trent v. Hanning, 10 Ves. jun. 500.

(*f*) Blosse v. Clanmorris, 3 Bligh, 62.

ever, to be regretted that such a rule should have been adopted.

The doubt generally turns upon a point of law, but the rule equally applies to other cases. Therefore where a testator, who appeared to be seised of the entirety of an estate, devised his undivided moiety, or half part of it, and all other his shares, proportions and interests if any therein; and no evidence appeared that he had not the entirety, and the words were sufficient, if he had, to pass it; Lord Eldon was of opinion that the title was good; but he was also of opinion that this was not a reasonably clear marketable title, without that doubt as to the evidence of it, which must always create difficulty in parting with it, and therefore he refused to force the title on a purchaser (*g*).

So there are many cases in which a jury will collect the fact of legitimacy from circumstances, in which it might be attended with so much reasonable doubt, that equity would not compel a purchaser to take it merely because there was such a verdict. The Court ought to weigh, whether the doubt is so reasonable and fair, that the property is left in his hands not marketable (*h*).

And where an action is brought against a purchaser for non-performance of an agreement, a court of law will look as anxiously to see that the title is clear of doubt as a court of equity would. Therefore in a case before Lord Kenyon at *nisi prius* (*i*), where an objection was made to the title, his Lordship said he would not then determine the point, nor was it necessary to do so. He thought it

(*g*) *Stapylton v. Scott*, 16 Ves. jun. 272. See 1 Ves. & Beam. 493; and see and consider *Hartley v. Smith*, 1 Buck, 368.

(*h*) *Per* Lord Eldon. See 8 Ves. jun. 428.

(*i*) *Hartley v. Peahall*, Peake's C. 131; *Wilde v. Fort*, 4 Taunt. 334; *sed qu.* whether at law the judge is not bound to decide the point?

a question of some nicety ; but whether it was or not, he thought it equally a defence to the action. When a man buys a commodity, he expects to have a clear indisputable title, and not such a one as may be questionable, at least, in a court of law (I). No man is obliged to buy a law-suit ; and a verdict was given for the purchaser.

In a late case (*k*), where at law the same argument was urged on behalf of a purchaser who was plaintiff, Lord C. J. Gibbs said, it was intimated that if any doubt could be cast on the title of the vendor, the plaintiff would be entitled to recover back his deposit. Now, if he had gone into a court of equity, the Chancellor would not, perhaps, have obliged an unwilling purchaser to ratify the contract. But if he come into a court of law to recover the deposit, on the ground of an insufficient title, he must abide by the decision of that court, and that is the difficulty which the party had brought upon himself by coming into a court of law.

In a late case, where the estate was sold without any notice, that it was recently allotted under an inclosure act, and it appeared *that the commissioners had not made their award*, and the act contained no clause authorizing a sale before the award ; Lord Ellenborough held, that the purchaser was warranted in refusing the title (*l*). But if the purchaser is at the time of the contract aware that the estate is in a progressive state of inclosure, and there is no ground to suppose that the commissioners will vary the allotments, assuming their power to do so, the pur-

(*k*) *Romilly v. James*, 1 Marsh. T. Term, 1810; *Cane v. Baldwin*, 600. 1 Stark. 65; *Farrer v. Billing*, 2

(*l*) *Lowndes v. Bray*, Sitt. after Barn. & Ald. 171.

(I) This expression seems to refer to the question, whether equitable objections to a title are a defence at law. *Vide supra*. p. 228.

chaser will be compelled to take the title although the award is not executed (*m*).

Where an act of bankruptcy has been committed, the purchaser cannot be compelled to take the title, although the vendor swear that he owes no debt upon which a commission can issue, and the purchaser cannot disprove the statement. The ground of this determination was, the impossibility of ascertaining that there was not such a debt as would support a commission (*n*). And upon the same principle, a purchaser who has become bankrupt cannot compel a conveyance of the estate to him; because he cannot satisfy the vendor that he will be entitled to retain the purchase-money (*o*).

So, where an estate is sold subject to a rent, which, although not so stated, appears to be only part of a larger rent charged on that and other property, the purchaser will not be bound to take the title, although for many years the apportioned rent has been received:—an apportionment by deed must be shown. It is the duty of the vendor to give the purchaser a complete formal discharge of all the further rent that the house was ever liable to. Although an apportionment may be presumed, yet, as Mr. Justice Chambre observed, the question here is not what may be presumed, but whether a purchaser is compellable to accept a purchase, where his title rests only on presumption, which may be rebutted by other evidence. And Lord Chief Justice Mansfield said, that a court of equity would not decree a specific performance in a case like this, unless the seller could procure the ground-landlord to apportion the rent, by joining in an

(*m*) *Kingsley v. Young*, MS.; S. C. 17 Ves. jun. 463, affirmed on an appeal by Lord Eldon. The act authorized a sale before the

(*n*) *Lowe v. Lush*, 14 Ves. jun. 547; *Cann v. Cann*, 1 Sim. & Stu. 284.

(*o*) *Franklin v. Lord Brownlow*,

assignment of the lease; in which assignment the apportioned rent should appear (*p*).

But where an apportioned rent is sold, if ~~the rent~~ is an apportioned rent, the purchaser cannot object that he will not have the same remedies as if the rent were entire (*q*).

So where an estate, held under one lease, is sold in lots, and the fact is stated, and it is stipulated that the purchaser of one particular lot is to be subject to the whole of the rent, the other purchasers cannot object to the title, although there is a clause of re-entry on non-payment of the rent contained in the lease (*r*).

In a case where an estate was sold in lots, and one of the conditions stated that the estate was subject to the perpetual payment of 120*l.* to the curate of *A*, but the same and a perpetual annual payment to the hospital of *B* were in future *to be charged upon* and paid by the purchaser of lot 1. only; it was held, that the purchasers of the other lots were only entitled to such an indemnity as could be made by the purchaser of lot 1. to the purchasers of the other lots (*s*).

So where the estate agreed to be leased was comprised with others in an original lease, under which the lessor had a right to re-enter for breach of covenants, so that the under lessee might be evicted without any breach on his part, it was held, by Sir John Leach, Vice-Chancellor, that he was not bound to accept the title with an indemnity. His Honor observed, that where a party comes for a specific performance, he desires the Court to give the party the specific subject. Now here he could not secure the

(*p*) *Barnwell v. Harris*, 1 Taunt. 430.

(*q*) So held by the V. C. in *Bliss v. Collins*, reported in 4 Madd. 229. See S. C. 1 Jac. & Walk. 426;

Walter v. Maunde, 1 Jac. & Walk. 181.

(*r*) *Walter v. Maunde*, *ubi sup.*

(*s*) *Cassamajor v. Strode*, 2 Swanst. 347; 1 Wils. Cha. Ca. 428.

possession of the subject upon the terms agreed upon. But he offers an *indemnity*. The lessee might be evicted, and therefore it was compensation and not indemnity that was offered. I will give you the subject of the contract not with a sure title, but with a compensation in case of eviction. It was not a case for an indemnity, and the Court could not compel a performance with a compensation (*t*).

In a late case (*u*), upon a purchase, it was agreed, that if there should be found any fee-farm rents, or quit-rents, chargeable on the same, an allowance should be made at the rate of thirty years purchase on the amount thereof. It appeared that the estate, with others of great value, was charged with a perpetual rent of forty marks, originally reserved to the Crown; but a similar rent was granted to trustees in fee, in the usual way, out of a part of the estate not sold, of nearly ten times the annual value of the rent, as an indemnity to the other estates against the rent. It was objected, that this charge prevented the seller from making a good title. It was argued, on the part of the seller, that this was the precise case in which a purchaser would be compelled to take a title with an indemnity. Equity looks only to the substantial execution of the contract; and here the rent was not, *in substance*, a charge on the land. It was not like the case of a lease, where non-payment of the rent, or non-performance of the covenants, might avoid the estate of the person who was required to accept the indemnity; but this was the simple case of a money payment, which would, of course, be accepted from the owner of the estate exclusively charged with it, by way of indemnity; and which estate would always be liable to answer any payment

(*t*) *Fildes v. Hooker*, 3d April 1813, MS.; 3 Madd. 193. Aug. 1813, MS. *vide infra*. See *Cassamajor v. Strode*, 1 Wils. Cha.

(*u*) *Hays v. Bailey*, Rolls, 10 Ca. 428.

made on account of the rent by the persons intended to be indemnified against it. The objection, if allowed, would affect half the titles in the kingdom. It applies to nearly all the estates which came into the hands of the Crown on the dissolution of the monasteries. *Dickenson v. Dickenson* (*x*) was a stronger case; for there the purchaser was compelled to take the title, although the Judge was of opinion, that if, in the event, the fund should turn out deficient for payment of the infant's legacies, they must still have recourse to the estate for the deficiency. The ground of the decision must have been, that there was no chance of the fund proving deficient. *Halsey v. Grant* (*y*) is a direct authority in favour of the seller; and there the indemnity fund was not so large with reference to the amount of the charge as the present; and although *Horniblow v. Shirley* (*z*), was a case of compensation, and not of indemnity, yet it appears that Lord Alvanley said, that if such an objection was to prevail, a purchaser of a portion of a large estate would always be at liberty to get rid of a contract (*a*). In the present case, the purchaser did not object to the estate being charged with a fee-farm rent, provided he was paid its value. Here the rent is charged only in point of form; and therefore he can require no allowance. On the part of the purchaser it was argued, that the clause relied upon, on the other side, was evidence that the purchaser was not to take the estate subject to any rent, unless it could be sold to him; and the estate would always be liable to the fee-farm rent, notwithstanding the indemnity. The Master of the Rolls was of opinion, that the clause in the agreement referred to a rent charging the estate sold only, and not to a rent charging

(*x*) 3 Bro. C. C. 19.

(*y*) 13 Ves. jun. 73.

(*z*) 13 Ves. jun. 8.

(*a*) 13 Ves. jun. 75.

it and other estates; and that the Master was justified in considering the rent as an objection to the title. As to the question of indemnity, his Honor observed that Halsey and Grant was certainly a case of indemnity; and Horniblow and Shirley a case of compensation; but he doubted whether the deed executed in order to relieve the estate in question, could be considered such an indemnity as a purchaser ought to be compelled to accept, nor should he decide whether in this case any indemnity could or ought to be given by the vendor against such fee-farm rent. He should leave that to be decided when the cause came on to be heard thereafter.

Upon an appeal to the Lord Chancellor he affirmed the decision of Sir William Grant, on the ground that the rent in question did not fall within the condition; and his Lordship treated the early cases as not being authorities, and held that a seller was bound accurately to describe what he was selling (*b*).

In the case of *Fildes v. Hooker* (*c*), Sir John Leach, Vice-Chancellor, observed, that the utmost length of indemnity was, that if a good title can be made subject to an incumbrance, the purchaser shall take the title, with a security protecting him against the incumbrance. He did not know that the Court had gone so far, and he should not be disposed to follow such a rule, because the purchaser is entitled to an estate free from incumbrance. It would be difficult to convince him that such a rule was right.

It hath been before observed, that a purchaser will not be compelled to take an equitable title; but this rule does not extend to estates sold before a Master under the decree of a court of equity. For in this case, although the legal estate is outstanding, and cannot be immediately got in, yet if the person seised of the legal estate is a

(*b*) M. T. 1821, MS.

(*c*) 3d April 1818, MS.; 3 Madd. 193.

party to the suit, the Court will compel the purchaser to accept the title, and will decree generally that the legal tenant shall convey, and that the purchaser shall in the mean time hold and enjoy.

And even where the legal estate is vested in an infant, the Court will compel the purchaser to complete his contract on the usual decree, that the infant shall convey when he comes of age, *unless he then shows cause to the contrary*; and that the purchaser shall in the mean time hold and enjoy.

Thus in a case (*d*) where, upon sale of an estate before a Master, in pursuance of a decree under Lord Waltham's will, the purchaser objected to the title, on the ground of the legal estate being in an infant; Lord Rosslyn, without the least hesitation, compelled the purchaser to take the title, making his decree for the infant to convey in the usual form; because, as the purchaser bought under the decree, he was bound to accept such a title as the Court could make him (*e*). And I learn that in a case of this nature, Lord Rosslyn would not sanction an application by the purchaser, at his own expense, for an act of parliament to divest the infant of the legal estate. Nor, if the estate be copyhold, will the Court retain any part of the purchase-money in order to defray the expense of the fine that would be payable, in case the infant heir should die before he surrendered (*f*).

But although a purchaser *under a decree* will be compelled to accept a title of this nature, yet, if he sell the estate, the Court will not enforce a specific performance against the second purchaser.

(*d*) Ch. MS. See *Chandler v. Beard*, 1 Dick. 392.

(*e*) But note, a purchaser under a decree will not be compelled to take a *doubtful* title. See *Marlow*

v. Smith, 2 P. Wms. 198; *Shaw v. Wright*, 3 Ves. jun. 22; *Noel v. Weston*, Coop. 138.

(*f*) *Morris v. Clarkson*, 1 Jac. & Walk. 604, n.; 3 Swanst. 558.

This was also decided by Lord Rosslyn. The purchaser of Lord Waltham's estate sold the estate to a person who objected to the title upon the same ground as he had objected to it, and refused to complete the contract. The first purchaser very confidently filed a bill for a specific performance, but Lord Rosslyn dismissed it; because such second purchaser *did not buy under the decree*, and therefore was not compellable to accept an equitable title (*g*).

But where the estate is not sold by the Court, although the purchaser agree to go before the Master upon a reference of title in a suit in Court for the administration of the estate, yet he is not bound to take an equitable title (*h*).

In a case where a seller after the contract died intestate, leaving an infant heir, who filed a bill against the purchaser, praying that he might elect either to complete or abandon the contract; and the purchaser submitted to perform the contract, and paid the purchase-money into Court, the Master of the Rolls refused to pay it out without the consent of the purchaser during the infancy of the heir (*i*).

In another case, where after a contract for sale the seller died intestate, leaving an infant heir, and his widow, who was his administratrix, filed a bill for a specific performance against the purchaser and the heir, it was decreed, and a day given to the heir to show cause (*k*). But the objection, that the purchaser was not bound to accept the title in consequence of the infancy of the heir was not taken.

The reason why a purchaser under a decree is com-

(*g*) *Powell v. Powell*, 6 Madd. 53.

(*h*) *Cann v. Cann*, 1 Sim. & Stu. 284.

(*i*) *Bullock v. Bullock*, 1 Jac. & Walk. 603.

(*k*) *Holland v. Hill*, Rolls, 18 Mar. 1818, MS.

pelled to take an equitable title seems to be this, that the Court has bound the right of the party in whom the legal estate is vested, and will not permit him to take advantage of it. This, however, is not the case where the legal estate is in an infant; as it makes part of the decree, that he shall convey when he comes of age, *unless he then shows cause to the contrary*.

In favour of the rule, by which a purchaser under a decree is compellable to take an equitable title, it may be said, that it facilitates sales under the decrees of the Court; but the injustice of it is too glaring. The decree of a court of equity acts *in personam*, and not like a judgment at law, *in rem*; and it is possible that the Court may never be able to compel the person seised of the legal estate to convey it to the purchaser.

Although an estate is not sold under a decree, and the legal estate appears to be outstanding, and cannot be got in, yet, if the circumstances of the case are such as would induce a court of law, under those grounds upon which presumptions are in general raised, to presume a reconveyance, the purchaser will be compelled to take the title (*l*). Reconveyances have been frequently presumed upon trials at law in favour of justice; but this doctrine was never applied to a contract between a vendor and purchaser, until the late case of *Hillary v. Waller*, which certainly has not met with the approbation of the bar. The decision has occasioned considerable difficulties in practice. As no man can say where exactly the line is to be drawn,

(*l*) *Hillary v. Waller*, 12 Ves. jun. 239; *Emery v. Growcock*, *ex parte Holman*, *post.* ch. 9, s. 2, div. iv; but see *Goodright v. Swymmer*, 1 Kenyon, 385; *Keene v. Deardon*, 8 East, 248; *Doe v. Brightwen*, 10 East, 583, which show that the circumstance of the

equitable estate being in the person who claims the benefit of the presumption, is not sufficient of itself to raise it; and see *Barnwell v. Harris*, 1 Taunt. 430; *Doe v. Calvert*, 5 Taunt. 170; *Cooke v. Soltau*, 2 Sim. & Stu. 154.

at what period the presumption is to arise, and what circumstances are sufficient to rebut it, each party puts his own construction on almost every case which arises. This, of course, leads to endless discussion and expense, and the very parties in whose favour the doctrine was introduced, ultimately feel how much it would have been to their interest, that the general rule of the profession had not been relaxed. This rule was, that a vendor was bound to get in all outstanding legal estates, which were not barred by the statutes of limitations. The certainty of the rule amply compensated for any individual hardship which it might sometimes occasion.

We have seen, that a purchaser cannot be compelled to take a *doubtful* title; but, nevertheless, he will not be permitted to object to a title on account of a bare possibility; because a court of equity, in carrying agreements into execution, governs itself by a moral certainty: it being impossible, in the nature of things, there should be a mathematical certainty of a good title.

Therefore *suggestions* of old entails, or doubts what issue persons have left, whether more or fewer, are never allowed to be objections of such force as to overturn a title to an estate (*m*).

So where (*n*), upon a purchase, it appeared that the estate had been originally granted by the Crown, in which grant there was a reservation of tin, lead, and all royal mines, without a right of entry; yet, as there had been no search made for royal mines for one hundred and eleven years, and, upon examination, the probability was great there were no such mines, and the Crown, for want of

(*m*) See 2 Atk. 20, *per* Lord Hardwicke; and see Lord Braybroke v. Inskip, 8 Ves. jun. 417; Dyke v. Sylvester, 12 Ves. jun. 126.

(*n*) Lyddal v. Weston, 2 Atk. 19. See Seaman v. Vawdrey, 16 Ves. jun. 390.

a right of entry, could not grant a license to any person to enter and work them, Lord Hardwicke decreed a specific performance.

Again, in a recent case (*o*), where a man articted for the purchase of an estate, with some valuable mines, and would not complete his contract because the mines were under a common, wherein others had a right of common, and consequently he would be subject to actions for sinking shafts to work the mines; Lord Eldon, after showing the improbability of any obstruction from the commoners, said, that in case such an action were brought, he should think a farthing quite damages enough; and therefore decreed a performance *in specie*.

This case, like the last, must be considered to have turned on the improbability of the purchaser being disturbed; otherwise it seems to have gone to the utmost verge of the law; for although such trifling damages could only be recovered, yet that would not be ground for a nonsuit, as was decided in the late case of *Pindar v. Wadsworth* (*p*). The estate, therefore, would subject the purchaser to litigation, whenever malice or caprice might induce any of the commoners to commence actions against him.

So a *mere suspicion* of fraud, which cannot be made out, will not enable a purchaser to reject the title. This was decided by Lord Eldon in a case where, under an exclusive power of appointment, a father appointed to one son in fee; and then the father and his wife and the son joined in conveying to a purchaser, and the money was expressed to be paid to them all. The title was objected to on the ground of an opinion, by which it appeared, that the father first sold the estate, and then the appointment was devised to make a title, and the purchase

(*o*) Anon. Chan. 7th Sept. 1803, MS.

(*p*) 2 East, 154.

deed recited that the contract was made with the father and son. And it was insisted that if the father derived any benefit from the agreement, or even made a previous stipulation that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution. But Lord Eldon overruled the objection, as it did not appear that the estate sold for less than its value, or that the son got less than the value of his reversionary interest, but merely that he, as the owner of the reversion, acceded to the purchase (*q*).

If a seller file a bill for a specific performance, and a third party file a bill against him, claiming a right to the estate, the mere fact of the pendency of the latter suit is not a sufficient reason for a Master's stating that a good title cannot be made, but the nature of the adverse claim should be examined and stated (*r*).

But if any person has a claim upon the estate which he ~~may~~ enforce, a purchaser cannot be compelled to take the estate, however improbable it may be that the right will be exercised. Thus, in the case of *Drewe v. Corp* (*s*), the vendor was entitled to an absolute term of four thousand years in the estate, and also to a mortgage of the reversion in fee, which was forfeited but not foreclosed. It was decided, that the purchaser who had contracted for a fee, was not bound to take the term of years. Nor was he compelled to take the title on the ground of the vendor having a forfeited mortgage in fee of the reversion, although it was evidently highly improbable that any one would ever willingly redeem a forfeited mortgage of a dry reversion expectant upon an absolute term of four thousand years.

(*q*) *M'Queen v. Farquhar*, 11 6 Madd. 373.
Ves. jun. 467. See *post.* ch. 17; (*r*) *Osbaldeston v. Askew*, 1
 and see *Barnwall v. Harris*, 1 Russ. 160.
Taunt. 430; *Boswell v. Mendham*, (*s*) *Vide supra*, p. 74.

So in a late case (*t*), where in 1704 the estate was sold with a reservation of salt-works, &c. with a right of entry, and the estate was sold in 1761, and no notice taken of the reservation, and the right had never been exercised; the Master of the Rolls was of opinion that non-user did not in this case raise the inference that the right was abandoned, and consequently the purchaser was entitled to take the objection, and his Honor distinguished this from the case of *Lyddal v. Weston* (*u*); first, because it was not alleged that there was no probability of mines, it was rather admitted that there were: secondly, here was the reservation of a right of entry, upon the want of which Lord Hardwicke laid stress in that case. In the case before his Honor, the purchaser chose to consider this not as an objection to the title, but as a ground for compensation, and it was decreed accordingly.

In a case where a close called the Croyle had always been known by that name, and had been possessed by the seller and his ancestors as part of the estate sold, but no mention was made of it in the deeds by name, and all the other lands were particularly described; the Court considered the evidence of title to be merely that of long possession, and held that the purchaser was not bound to accept the title (*x*).

Equity discountenances the destruction of contingent remainders (*y*), yet if they really are barred, a purchaser will be compelled to accept the title. This point, which was formerly doubted, was very fully argued before Lord Eldon (*z*), who several times expressed a strong opinion upon it in favour of the seller, although ultimately he was not called upon to decide the point;

(*t*) *Seaman v. Vawdrey*, 16 Ves. jun. 390.

(*u*) *Supra*, p. 325.

(*x*) *Eyton v. Dicken*, 4 Price, 303.

(*y*) *Roake v. Kidd*, 5 Ves. jun. 647.

(*z*) *Kenn v. Corbett*, MS.

and it has since been decided by Sir John Leach, when Vice-Chancellor (*a*).

Where an abstract begins with a recovery to bar an entail, it is usual in practice to call for the deed creating the entail, in order to see that the estate-tail and remainders over, if any, were effectually barred (I). But if the deed is lost, and possession has gone with the estates created by the recovery, for a considerable length of time, and the presumption is in favour of the recovery having been duly suffered, the purchaser will be compelled to take the title, although the contents of the deed creating the entail do not actually appear (*b*).

So where an old deed recites prior deeds, and the seller is unable to procure the instruments recited, the true inquiry is whether the absence of the deeds recited throws any reasonable doubt upon the title. Where there is a sixty years title without the aid of the recited deeds, and no circumstance to repel the presumptions in favour of the title, the Court will compel the purchaser to accept it (*c*).

Where a vendor is tenant in tail, with reversion to himself in fee, and the reversion has vested in different persons, a common recovery is generally required by a purchaser; because that *bars* the remainder, while a fine lets it into possession, and thereby subjects the whole fee to any incumbrance which before affected the rever-

(*a*) *Hasker v. Sutton*, 2 Sim. & Stu. 313.

No. 13; and see *Nouaille v. Greenwood*, 1 Turn. 26.

(*b*) *Coussmaker v. Sewell*, Ch. 4th May 1791, MS.; Appendix,

(*c*) *Prosser v. Watts*, 6 Madd. 59.

(I) This makes it advisable in deeds to make a tenant to the *præcipe*, or to lead the uses of fines, to recite so much of the instrument under which the tenant in tail claims, as will manifest his power of barring the estate-tail and remainders over.

sion only. But unless some incumbrance appear, or the title to the reversion is not clearly deduced, the Court will not compel a vendor to suffer a recovery on account of the mere probability of the reversion having been incumbered.

Thus in a late case (*d*), upon an exception to the Master's report in favour of the title, the objection to the title was, that one Elizabeth Baker ought to join in a recovery; the title being derived from John Pain, who, 1693, limited the estate to the use of himself for life; remainder, subject to a term, to uses which never arose; remainder to his daughters in tail; remainder to himself in fee. Under these limitations, Elizabeth, an only daughter, became seised in tail, with the immediate reversion to her father, who made a will, not executed so as to pass real estate, whereby he devised all his estate to his second wife. Upon his death, Elizabeth his daughter entered, and levied a fine. She had issue a daughter, Elizabeth, who married William Baker. They had issue one daughter, Elizabeth Baker. From her the estate was purchased under a decree, and by mesne purchases became vested in the plaintiff. The defendant, the purchaser, suggested, that the ultimate remainder in fee might have been by deed or will disposed of by John Paine, or by any other person to whom it might have descended; and if the same should have been so disposed of, it could then be barred only by Elizabeth Baker. The Lord Chancellor held a recovery not necessary.

It will occur to the learned reader, that, notwithstanding the defendant's suggestion, it was highly improbable that the reversion was disposed of by John Paine in his life-time, such an interest not being marketable; and as he devised all his estate by his will, there was no ground

(*d*) *Sperling v. Trevor*, 7 Ves. jun. 497.

that he made another will. Upon his death, the inheritance descended to his daughter, who took it into possession, and consequently afterwards he created upon it, as to the particular estate.

It happens, that in deeds securing the estate, the estate is authorized to be without the assent of the owner, in case default is made of the money on the day named. Such a deed is so far a mortgage, that the owner may at any time before a sale require a reconveyance upon paying the money due; and in consequence of the old rule, that once a mortgage, always a mortgage, the owner is in these cases usually required to join in the conveyance, which he is mostly unwilling to do; his object being to prevent a sale. But it has been decided by Lord Eldon, that the objection cannot be sustained, and this decision was made in a case where the deed was in form a regular mortgage with a power of sale, and the mortgagor in his answer stated that he actually resisted the sale as having been made without his consent and at an undervalue (e). This has been followed in many later cases, and is now an established rule (f).

It is clear that a woman is barred of her dower both at law and in equity, by a legal term created previously to her right of dower attaching on the estate, of which an assignment has been obtained by a purchaser to attend the inheritance (g). For although she can recover her dower at law, it will be with a *cesset executio* during the

(e) *Clay v. Sharpe and others*, Ch. Mich. Term. 1802, Lib. Reg. A. 1802, fo. 66, Appendix, No. 14.

(f) *Baker v. Dibbin*, *Dibbin v. Baker*, Exch. April 20, 1812, MS.; *Corder v. Morgan*, 18 Ves. 344;

Note, *Stabback v. Leatt*, Coop. 46, which was taken from a hasty note on a brief, is not, when attentively considered, an authority the other way.

(g) *Vide infra*, ch. 9.

term, and equity will not remove the bar. But notwithstanding that a purchaser can obtain an assignment of an outstanding term, which will bar the vendor's wife of her dower, a fine is always required from the vendor and his wife at his expense.

Upon the authority of the anonymous case before Lord Eldon, before cited (*h*), it perhaps might be doubted, whether a court of equity would not enforce a purchaser to accept the title without a fine. It must at the same time be observed, that in that case the vendor could not make the title perfect; whereas in the case under consideration a vendor can remove every difficulty at a trifling expense; which circumstance would certainly have great weight with a court of equity. In a late case, however, Lord Eldon put the very point. He said, that if a husband entered into a contract to sell an estate, not contracting for more than to make a good title; no specialty about dower; but the Master's report was in favour of the title, on the ground that a term was outstanding which might be assigned; *the Court would make the purchaser take the title as the trustees might convey* (*i*). This was only an *obiter dictum*, and with all the respect due to the Judge from whom it fell, is open to much observation. In the first place, it assumes what has never been decided, that equity would *compel* trustees of a term with notice of the wife's right, to assign the term to a purchaser, so as to exclude the title of dower. The Court would probably feel great reluctance in making such a decision. It is one thing to say, that when a purchaser has obtained an assignment of a term, he may avail himself of it as a protection against the wife's dower, "because such was the general practice and opinion of conveyancers (*k*);"

(*h*) *Supra*, p. 326.

(*k*) *Vide infra*, ch. 9.

(*i*) See 10 Ves. jun. 261, 262.

and another, for equity to say that, as a discreet exercise of its jurisdiction, it will compel trustees to assign the term to a purchaser, in order to exclude the widow. In *Maundrell v. Maundrell*, the Master of the Rolls forcibly observed, that a purchaser, merely as such, has no equity whatsoever against the widow, claiming by title prior to, and both legally and equitably as good as his. The term, if it continued outstanding, is as much attendant in equity upon dower, as the remaining interest in the inheritance; and therefore ought not to be set up by the latter against the former (*l*). But admitting that equity would compel trustees to assign the term, yet two weighty reasons present themselves why a purchaser should not be compelled to rely on the term. The one, that he would be at the expense of keeping the term on foot; the other, that if a writ of dower should be brought against him, and the term were even to protect him against the widow's claim, yet he must pay the costs of the action, &c. These are the reasons why a fine is in practice insisted upon. The very point now stands for judgment before the Lord Chancellor in *Mole v. Smith* (*m*), where the attendant term had by the death of the trustee, and the grant of administration to his personal estate, become vested in the dowress herself. The case involves two points: 1. Whether the widow is entitled to dower, notwithstanding the existence of the term; 2. If not, whether the purchaser can be compelled to rely upon the term.

Since the publication of the last edition, the Lord Chancellor has decided that the widow is not entitled to dower, as against the term, and that the purchaser must rely upon the protection of the term (*n*).

(*l*) See 7 Ves. jun. 579.

665, the report upon the hearing

(*m*) MS. See 1 Jac. & Walk. at the Rolls.

(*n*) 1 Jac. 490.

The wife of a trustee in fee, or of a mortgagee in fee of a forfeited mortgage, is at law entitled to dower ; but a fine is on that account never required by a purchaser ; because, if the wife of a trustee or a mortgagee were to be so ill-advised as to prosecute her legal claim, equity would, at this day, undoubtedly saddle her with all the costs (*o*).

But where the wife of a vendor has only an *equitable* jointure, some gentlemen require a fine ; this practice is, however, discountenanced by the majority of the Profession ; and if a woman equitably barred of her dower, should bring a writ of dower, it seems clear that equity would protect the purchaser, and condemn the widow in costs.

But it is objected by the advocates for a fine, that if the fund upon which the equitable jointure is charged, should be evicted from the jointress, she could then claim her dower out of any real estate of which she would otherwise have been dowable. And this objection seems equally to apply to a legal jointure. For it is by the statute of uses (*p*), by which jointures are made bars to dower, declared, that if any woman be lawfully evicted from her jointure, or any part thereof, without any fraud or covin, then she shall be endowed of as much of the residue of her husband's tenements or hereditaments whereof she was before dowable, as the same lands and tenements so evicted shall amount to.

When the first edition of this work was published, the author was not aware of any case in which this doctrine was expressly established, but he stated, that no reason appeared why a jointress evicted of her jointure should not recover her dower out of lands sold by her husband,

(*o*) See Noel v. Jevon, Bevant v. Pope, 2 Freem. 43, 71.

See Gervoyes's case, Mo. 717. pl. 1002 ; and see 4 Co. 3 b ; 4 Bro.

(*p*) 27 Hen. VIII. c. 10, s. 7. C. C. 506, n.

of which she would have been dowable at common law ; and that if so, although the wife of a vendor had a *legal* jointure, a purchaser ought to insist on a fine, unless he was satisfied that the title to the jointure lands was good. He remarked, however, that this was never attended to in practice, and that he never heard that the objection was taken, which made him apprehensive he had fallen into an error. The point could not, he thought, so long have escaped notice. But he concluded that, whether a jointress, evicted from a legal jointure, could claim her dower out of lands sold by her husband, of which she was dowable at common law, or whether she was entitled to no relief against a purchaser, it seemed clear, that, unless in the case of a legal jointure a purchaser could call for the title to the jointure lands, or require a fine, he could not do so in the case of an equitable jointure, where the wife was adult at the time of the marriage ; for there could be no doubt but that equity would act in strict analogy to legal jointures.

Since the publication of the first edition, the author has met with Maunsfield's case, which was adjudged in the 28th of Eliz. (q). There a jointure was conveyed to the wife before the coverture, and during the coverture the husband purchased other lands, and aliened them again, and died : the land which the wife had in jointure was evicted, and the wife had dower of the lands which were purchased, and aliened by the husband at the time when she was barred of her action of dower. This case expressly decided the point before discussed, as to a legal jointure ; and equity must, in this respect, follow the law.

(q) Harg. n. 8 to Co. Litt. 33 a, stated from a MS. commentary on Litt. supposed to have been written before the publication of Sir

Edward Coke's Commentary. See Simpson v. Gutteridge, 1 Madd. 609.

It is not necessary that a wife should previously to marriage be a party to the deed securing her jointure, but there is no *decision* to prove that a jointure can be made upon a wife before marriage without the privity of herself, or if under age of her guardian, which will bind her (*r*). There have been different opinions upon this question, but if a wife could be barred without her privity, a man might in every case secretly bar his wife of dower by a mere nominal jointure. The statute does not authorize such a fraud; and it would lead to great inconvenience to refer it to a jury to inquire whether a jointure made without the wife's privity was fraudulent or not. The power which the statute reserves to a woman to elect her dower where a jointure is made after marriage, unless by act of parliament, appears to proceed on the ground that she is during the coverture incapable of consenting to the jointure without the aid of parliament; and seems to prove that the legislature could not intend to bind her by a jointure made without her privity, when she was competent to consent. If her consent was not necessary, it would be unimportant whether the jointure was made by her husband before or after marriage. At the common law, a jointure before marriage was not a bar of dower for two reasons: 1. because the woman had no title of dower at the time of the acceptance of the satisfaction; 2. because no collateral satisfaction can bar any right or title of any inheritance or freehold. Coke explains the origin of jointures thus: Before the making of the statute of uses, the greatest part of the land in England was conveyed to uses, and as a wife was not dowable of uses, *her father or friends upon her marriage procured the husband to take an estate from his feoffees, or others seised to his*

• (*r*) In *Jordan v. Savage*, 2 Eq. Ca. Abr. 101, the widow took possession of the lands limited to her for her jointure by the articles; see 2 Eden, 66.

use, to him and to his wife before or after marriage for their lives or in tail, *for a competent provision for the wife after the husband's death*. Then came the statute of uses, by the operation of which, if further provision had not been made, the wives would have as well their dowers as their jointures, and for this reason the branches concerning jointures were added to the statute (*s*). In a passage where Coke says, that if a jointure is made to a woman before marriage the wife cannot wave it, he refers to an authority in which the jointure was made in performance of covenants (*t*). It is evident that Coke considered that her assent was requisite to a jointure made before marriage. Gilbert was of the same opinion. In his Uses (*u*), he says, if a jointure be made before marriage, she is *sole, and as such under no man's power*; if after marriage she take a jointure in satisfaction of a dower, she may wave it after coverture. But whatever may be the law on this point, no jointure is ever made without the wife's privity. No case has occurred since the statute of Hen. VIII. of a jointure made without the wife's privity, and not afterwards accepted by her. Of course, therefore, no distinction ever existed in practice between such cases, and cases where the wife being adult consented to the provision. The provision in each case, that is, whether made with or without her consent, equally proceeds from the husband, and is equally supported by the same consideration; viz. marriage. If the jointure, made with the wife's privity before marriage, does not preclude her from claiming dower out of her husband's other estates, if she be evicted from her jointure, under the provision in the statute, of course the same rule must prevail in equity. Clearly, equity could not, on the ground of implied contract, or of the wife's right to investigate the

(*s*) 4 Rep. 1 b, 2 a.(*t*) Ib. 3.(*u*) Page 152.

title to the jointure lands, restrain her from claiming her dower out of her husband's other estates. No such equity has ever been administered. It is admitted, that jointures made with the wife's privity are only a bar by force of the statute, but the bar does not extend to the excepted case of an eviction of the dower; and to raise a case of equity against a woman claiming the benefit of the exception, it would be necessary to prove an express contract by her relinquishing such benefit.

The author's present impression therefore is, that where an estate would be subject to the dower of the vendor's wife, if she were not barred by a jointure, whether legal or equitable, the vendor must either procure his wife to levy a fine of the estate at his own expense, or must produce a satisfactory title to the jointure lands. And this is no more than is constantly required where an estate has been taken in exchange. The vendor is compelled to produce the title not only to the estate sold, but also to the estate given by him in exchange. The same principle applies to the case under consideration.

Equity appears to consider any provision, however inadequate or precarious it may be, which an adult previously to marriage accepts in lieu of dower, a good equitable jointure (*x*): and will in some cases even *imply* an intention to bar the wife of her dower; thus, where a provision was made for the livelihood and maintenance of the wife after her husband's death, although it was not expressed to be in bar of dower, yet it was holden to be a bar in equity, on the implied intention of the parties (*y*).

(*x*) *Jordan v. Savage*, Bac. Abr. Jointure, (B) 5; *Charles v. Andrews*, 9 Mod. 152; *Williams v. Chitty*, 3 Ves. jun. 545; 4 Bro. C. C. 513. This was admitted by the

counsel for the appellants in *Drury v. Drury*. See 5 Bro. P. C. 581.

(*y*) *Vizard v. Longdale*, 3 Atk. 3, cited; reported 2 Kel. Cha. Ca. 17, nom. *Vizod. v. Londen*. See

in a case where a leasehold estate was settled before the wife upon the intended wife "in recompense, and dower, and for a provision for her," and the husband had no real estate, it was held that the wife's right to dower was not barred (2). For, as the declared object of the settlement was to bar her of dower, no implication could be drawn, that she was to be barred of thirds also; the fact that the settlement was for a provision for her, expressed the effect of the settlement, and could not afford evidence of an intention to bar her of a right which was not named.

Infants are within the statute of Henry VIII. (a), and may be barred of dower at law, they may in like manner be barred by an equitable jointure (b).

An equitable provision in bar of dower will not bind an infant, unless it be as certain a provision as her dower.

Therefore a settlement of an estate upon an infant in life, after the death of her husband *and any third person* will not be a good bar, as the stranger may survive (c). So a provision that the personal estate shall be paid according to the custom of London, in bar of dower, or a provision of that nature, will not be deemed an adequate bar of dower to an infant, on account of the uncertainty and precariousness of the provision (d).

It is not sufficient to charge an equitable jointure to be merely charged upon the estate, if it is not vested in trustees, *and the wife to have been married*

fig. 148; *Estcourt v. Estcourt*, 20. See *Tinny v. Cox*, 20. *Conch v. Statton*, 177.

1. 391; and *Garthshore v. Garthshore*, 10 Ves. jun. 20. See (7) to *Gilb. on Uses*,

Swell v. Byron, 3 Bro. 1. See *Pickering v. Lord*, 3 Ves. jun. 332.

Drury v. Drury, or, *Earl of*

Bucks v. Drury, 5 Bro. P. C. 570; 4 Bro. C. C. 506, n.; *Wilmot*, 177.

(b) See the cases, *ante* n. (t).

(c) *Caruthers v. Caruthers*, 4 Bro. C. C. 500. See *Corbet v. Corbet*, 1 Sim. & Stu. 612, which was affirmed by the Lord Chan. upon appeal.

(d) *Smith v. Smith*, 5 Ves. jun. 189.

ried under age, there seems reason to contend, that *if the fund should be wasted by the trustees*, equity would not restrain the wife from proceeding for her dower; and in that case a purchaser would certainly be entitled to a fine (I).

In *Caruthers v. Caruthers* (e), Lord Alvanley, then Master of the Rolls, addressing himself to what was and what was not an equitable bar of dower to an infant, put the case of a charge in bar of dower made upon an estate with a bad title, and held that it would be no bar. Therefore, whatever opinion may be entertained on the general question, a purchaser must be satisfied of the title to the lands upon which the equitable jointure of a *feme covert* married under age is charged. And where the settlement rests in covenant, the purchaser should not complete his contract until the covenant be actually performed; for an alienation by the husband of the fund out of which the jointure is to arise, will be deemed an eviction of the fund, and consequently the wife will be let in for her dower (f).

It appears from some manuscript opinions, that Mr. Fearne frequently advised a purchaser to take a fine from a vendor and his wife, although she was legally barred of her dower by settlement. To use his own words in an opinion: "It may not be improper to have a fine from Mr. H. and his wife, notwithstanding she is barred of dower by settlement. I frequently advise such a step to preserve the purchaser at any time from the difficulty of proving, or coming at such settlement; but as the fine is not necessary, it must of course be at the purchaser's own expense, if he chooses to have it."

(e) 4 Bro. C. C. 500. See 5 Ves. jun. 192.

(f) *Drury v. Drury*, 4 Bro. C. C. 506, n.

(I) This point does not appear to be decided either by *Drury v. Drury*, or *Williams v. Chitty*.

In the case of *Pope v. Simpson* (g), Lord Rosslyn appears to have held, that persons purchasing from the assignees of a bankrupt have no right to expect more, than that the assignees should deliver over such title as the bankrupt had. This decision, however, was opposed by prior cases (h), and the general rules of equity; and in a late case Lord Eldon expressly denied the doctrine advanced by Lord Rosslyn (i); and Sir William Grant since actually decided, that assignees stand in the situation of ordinary vendors (k).

But in a case (l) where assignees, having a defective title, put it up to sale, and one of the conditions stated, that the purchaser should have an assignment of the bankrupt's interest to one moiety of the estate, *under such title as he lately held the same*, an abstract of which might be seen at a place named in the conditions, the Vice-Chancellor stated, that a vendor, if he thinks fit, may stipulate for the sale of an estate with such title only as he happens to have; and he held, that in this case the assignees sold only such title as they had; but as it was stated that the conditions of sale were not circulated before the sale, the purchaser was offered an inquiry as to this fact.

Conditions like that in *Freme v. Wright* should be looked at with great jealousy, as they are often traps for the unwary; and the Court should at least expect the fact to be broadly stated, that the seller only sells such title as he has, without warranting the same.

In *Dick v. Donald*, in the House of Lords, where the

(g) 5 Ves. jun. 145.

(k) *M'Donald v. Hanson*, 12 Ves.

(h) *Spurrier v. Hancock*, 4 Ves. jun. 667; and see *Orlebar v. Fletcher*, 1 P. Wms. 737.

jun. 277.

(i) *White v. Foljambe*, 11 Ves. jun. 337; and see 18 Ves. 512.

(l) *Freme v. Wright*, 4 Madd. 364. See *Baxter v. Conolly*, 1 Jac. & Walk. 576; *Wilmot v. Wilkinson*, 6 Barn. & Cress. 506.

articles of roup in Scotland bound the seller to execute and deliver a valid irredeemable disposition of the property, and to deliver to the purchaser certain specified instruments, "which are all the title-deeds of the property in his, the seller's custody," and it was insisted that the title was limited by the articles of roup, it was decided otherwise; and Lord Eldon said, that he could see nothing in the article of roup to take away the right to a good title. As to the condition with respect to the title-deeds, he never heard that because the seller provides, by the condition, that he will give to the purchaser only certain specified deeds, the purchaser must take a bad title, or such title as appears upon the deeds (*m*).

Formerly, where a vendor claimed under a modern will, by which the heir at law was disinherited, it was usual to require the will to be proved in equity against the heir at law (*n*): but this practice is now almost wholly discontinued. In the case of *Colton v. Wilson* (*o*), the purchaser was in the first instance discharged from his purchase on account of the will not being proved against the heir at law; but on a rehearing he was compelled to take the title. This decree, however, was made on the particular circumstances of the case, and the point was by no means settled. In *Bellamy v. Liversidge* (*p*), the title received the Master's approbation, although the will was not proved against the heir at law; and upon exceptions to his report on that account coming on, Lord Kenyon, then Master of the Rolls, overruled them.

It is not unusual to require the heir at law to join in

(*m*) 1 Bligh, N. S. 655.

(*n*) See Fearne's Posthuma, 234.
See *Harrison v. Coppard*, 2 Cox, 318, as to the custody of the will.

(*o*) 3 P. Wms. 190.

(*p*) Chan. 12 June 1786, MS.;

and see *Wakeman v. Duchess of Rutland*, 3 Ves. jun. 233; 8 Bro. P. C. 145; and *Morrison v. Arnold*, 19 Ves. jun. 673; *sed vide* *Smith v. Hibbard*, 2 Dick. 730.

the conveyance, if his concurrence can be easily obtained; and where he is a party to a conveyance in any other character, he is invariably made a conveying party, in his character of heir at law; although, in strictness, this could not be insisted upon.

If it should even be thought that a modern will must be proved against the heir at law, yet it seems clear that equity would not compel the vendor, at the suit of the purchaser, to prove the will *per testes*. The objection, therefore, under any construction, could only be set up by a purchaser, as a *defence* to a specific performance.

If a will was executed it must be produced before a purchaser can be compelled to accept the title, although having been treated as a nullity by a professional man it has been mislaid, and the seller, being heir of the testator, has rested upon his title as heir (*q*).

IV. There is a serious objection frequently taken to titles, which it may not be improper to consider in this place.

The objection to which I allude is, that an equitable recovery is void where the *equitable* tenant to the *præcipe* has the legal estate. In support of this objection, it is urged, that where the legal freehold is limited to one for life, with an equitable remainder to the heirs of his body, the estates cannot coalesce so as to make the parent tenant in tail, notwithstanding that he has the beneficial, and consequently the equitable estate for life; and therefore, upon the same principle, the legal tenant for life cannot be considered as seised of an equitable estate, distinct from his legal estate, so as to support the recovery as a good equitable recovery.

In answer to this argument it may be said, that the reason why the equitable remainder to the heirs of the

(*q*) *Stevens v. Guppy*, 2 Sim. & Stu. 132.

body cannot coalesce with the legal estate for life is, that the rule in Shelley's Case requires both estates to be legal. This is an imperative rule of law, which courts of equity can no more depart from than they can alter the rules of descent. Equity, however, follows the law; and, therefore, if both estates are equitable, they will unite in the same manner as if they were legal estates. But as Mr. Fearne, with his usual ability, observes, when both the estates are *not legal*, the application of a *legal construction*, or operation of a *rule of law*, which must equally affect *both*, seems to be excluded by one of the objects of that construction not being a subject of *legal cognizance*. So when both are *not equitable* estates, their combination seems to be out of the reach of an *equitable construction* to which one of the estates is not adapted (*r*).

Now this difficulty does not occur in the principal case. The equitable estate tail has no existence in contemplation of law, but depends wholly on the rules of equity for its support. And therefore there is no rule of law which says that the recovery shall be void. Equity, with respect to equitable recoveries, adheres as nearly as may be to the mode of barring entails prescribed by the law. In this instance the analogy is strictly preserved, for the tenant to the *præcipe* has the equitable estate of freehold. And if a court of equity were to hold a recovery bad, on the ground of the equitable tenant to the *præcipe* having the legal estate, it would only make another deed necessary. The tenant for life would convey to a third person in trust for himself, before he made a tenant to the *præcipe*, and by this simple expedient vanquish the objection.

In a manuscript opinion, given by Mr. Fearne, on this point, in which he held the recovery to be good, although the equitable tenant to the *præcipe* had the legal estate,

(*r*) Cont. Remainders, p. 78, 5th edit.

he first adverts to the analogy preserved between legal and equitable recoveries, and then proceeds thus : “ The principle applies with no less force, where we suppose the tenant for life to be of the *legal estate*, for his *own benefit*. For then the *equitable interest* is involved in the *legal* ; and of consequence all that is required by the said rule of analogy is had in *his concurrence*, viz. the concurrence of the person entitled *to the beneficial interest or permanency of the profits* of the immediate estate of freehold. If the concurrence of a person entitled to the mere beneficial interest of freehold will answer the rule of analogy to the requisite extent for barring *equitable estates tail and remainders*, can there be a doubt in regard to the competency of the person entitled *not merely to that degree of interest*, but to a *comprehending greater estate*, adequate even to the purpose of *barring legal estates and remainders* ? The analogy supposes that a recovery by an equitable tenant in tail will bar the equitable estate tail and remainders, and reversion, even where, if the estate tail and remainders had been *legal*, such recovery *would not have barred them* for want of a legal tenant to the *præcipe* ; because that analogy in the one case *substitutes an equitable tenant* in the place of a *legal one* in the other. Now, can the same rule of analogy ever deny to a recovery by a tenant in tail of an *equitable estate* the same effect in barring his estate tail and the subsequent equitable remainders and reversion, as it *would have had* if all those estates *had been legal* ? Such a doctrine would be out-running the analogy, and the very ground for its adoption, in disabling those very persons from barring equitable estates-tail and remainders, who might have barred them if they had been *legal* instead of *equitable*. This would scarcely be reconcileable with the well-known maxim of *aquitas sequitur legem*.

life in law; *and this although it was objected that he ought first to have exhibited his bill, and have had his estate decreed to him in tail according to the articles (u).*

But, even admitting this objection, it cannot be extended to a case where the equitable tenant for life, who makes the tenant to the *præcipe*, is legal tenant *in fee*. The estates are perfectly distinct. He is not legal and equitable tenant for life, but tenant in fee of the legal estate, and tenant for life of the equitable interest (x).



V. It so often becomes necessary to consider in what cases an uninterrupted possession creates a title, that the introduction of a few general observations on the operation of the statutes of limitations, may not be deemed impertinent (I).

(u) *Goodrick v. Brown*, 2 Freem. 180; 1 Cha. Ca. 49.

(x) *Marwood v. Turner*, 3 P. Wms. 171.

(I) By the 21 Jac. I. c. 16, s. 1, 2, it was enacted that all writs of formedon in descender, formedon in remainder, and formedon in reverter of any manors, lands, tenements or other hereditaments whatsoever, at any time hereafter, to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; and that no person or persons shall, at any time hereafter, make any entry into any lands, tenements or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same; and in default thereof, such person so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary notwithstanding. Provided nevertheless, that if any person or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be at the time of the said right or title, first descended, accrued, come or fallen, within the age of one-and-twenty years, *femes covert*, *non compos mentis*, imprisoned or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act, so

1. Then the statutes of limitations operate by way of bar to the *remedy*, and not, like the statutes of fines, as a bar to the *right* (z). Therefore, although a person is barred of one remedy, yet he may pursue any other remedy which may afterwards accrue to him. Thus, where a tenant in tail discontinued for three lives, and the issue in tail was barred of his formedon by the 21 Jac. I. (a); afterwards by the death of the three tenants for life, a right of entry accrued to the issue, who entered, and his entry was held lawful (b).

2. It has frequently been thought that the rights of infants, femmes covert, persons in prison, and beyond sea, are saved by the act of 32 Hen. VIII. (c); but on examination it will appear, that the savings extended only to persons who laboured under any of those disabilities *at the time the statute was made* (d), (I).

3. The saving clause in the act of James (II) only extends to the persons on whom the right *first* descends; and therefore, when the time once begins to run, nothing can stop it (e). So that on the death of a person in

(z) See Beckford v. Wade, 17 Ves. Jun. 87.

(a) Ch. 16.

(b) Hunt v. Bourne, Lutw. 781; 2 Salk. 422; Com. 124; 1 Bro. P. C. 53.

(c) Ch. 2.

(d) See Bro. Reading, p. 60.

(e) Doe v. Jones, 4 T. Rep. 300;

Cotterell v. Dutton, 4 Taunt. 826.

as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of, and sue forth the same, and at no time after the said ten years.

(I) In even the last edition of Bacon's Abridgment, it is stated generally, that the act of 32 Hen. VIII. hath the usual saving for infants, femmes covert, persons in prison, and beyond the sea.

(II) *Note*, Dublin, or any other place in Ireland, is a place within the meaning of the saving of the rights of persons beyond the seas. Anon. 1 Show. 90.

whose life the time first began to run, his heir must enter within the residue of the ten years, although he laboured under a disability at the death of his ancestor.

In the late case of *Cotterell v. Dutton* (*f*), a tenant in tail died, leaving the issue in tail a feme covert, who died under coverture and left issue two sons, both infants, the eldest attained twenty-one and died without issue, leaving his brother under age, who did not sue forth his writ of formedon within ten years after he attained twenty-one, and more than twenty years had elapsed after the right had first descended. It was held that he was barred by the statute. The ground of this decision was, that the time began to run against the eldest son when he attained twenty-one, and no subsequent disability could stop it; therefore he and his heirs had only ten years from his attainment of twenty-one. This case overruled a notion which had been entertained by some, that issue in tail have distinct and successive rights under the statute, and were not to be barred like the heirs of fee-simple estates. This, however, was decided otherwise. Mr. Justice Heath said, that there was no such difference between the issue in tail and other heirs, as was supposed; formedon in the descender was expressly mentioned in the first clause of the statute: And the point was expressly decided the same way in the later case of *Tolson v. Kaye* (*g*).

In the case of a fine, it was formerly thought, that if a person died under a disability, his heir was excepted out of the statute of fines, by the proviso (*h*); although the contrary has been determined by a modern case (*i*). In the statute of James, the Legislature being aware of this point, expressly provided for the *death* of the person to

(*f*) 4 Taunt. 826.

and the cases there cited.

(*g*) 3 Brod. & Bing. 217.

(*i*) *Dillon v. Leman*, 2 H. Black.

(*h*) See Cruise on Fines, 258, 584.

whom the *first* right should descend; and, therefore, where a person, to whom the right first descended, dies under a disability, his heir must enter within ten years after his death (*j*).

In the case of *Doe v. Jesson* (*k*), the person upon whom the right first descended was presumed to have died in 1785, *under a disability*, leaving his heir also under a disability. The disability ceased in 1792, but the ejectment was not brought till 1804; more than twenty years had elapsed since the death of the person last seised, and more than ten years had elapsed after the cesser of the disability of the plaintiff; and the Court determined that the ejectment was out of time. Lord Ellenborough held that the person through whom the lessor of the plaintiff claimed, being under a disability at his father's death, when his title first accrued, and dying under that disability, the proviso in the second clause of the statute, (where resort is to be had to it, to extend the period for making an entry beyond the twenty years), required the lessor of the plaintiff, as heir to her brother, to make her entry within ten years *after his death*. The word *death* in that clause must mean and refer to the *death of the person to whom the right first accrued*, and whose heir the claimant is, and the statute meant that *the heir* of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability, (notwithstanding the twenty years from the first accruing of the title to the ancestor should have before expired). Mr. Justice Lawrence also gave his opinion that the ten years

(*j*) See *Jenkins*, 4 Cent. pl. 97; (*k*). 6 East, 80.
Doe v. Jesson, 6 East, 80.

to the heir run from *the death* of the party dying under the disability.

It will appear that it was not necessary for the Court to decide from what period the ten years should run ; for more than ten years had elapsed from the time the heir who brought the ejectment attained twenty-one, when her disability ceased. In the late case of *Cotterell v. Dutton* (*l*), where this doctrine was stated, the Court was of opinion that *the heir* has ten years *after the disability ceases*, not from the death of *the ancestor* who died under a disability. “ The ten years do not run at all while there is a continuance of disabilities.” This certainly appears to be the true construction of the statute, and it is the construction which has invariably been adopted in practice.

It seems that where no account can be given of a person within the exceptions in the act, he will be presumed to be dead at the expiration of seven years from the last account of him (*m*).

The disability of one coparcener will not preserve the title of the other, who must enter within twenty years after the title accrues, although during the whole time her coparcener laboured under a disability (*n*).

4. It is generally conceived, that a possession for sixty years creates a good title against all the world. Thus Judge Jenkins (*o*) lays it down, without qualification, “ that a peaceable possession for sixty years makes a right ; for 21 Jac. I. c. 16, takes away the entry and assize ; 32 Hen. VIII. takes away the writ of right and the formedon.” So Mr. Justice Blackstone says (*p*), “ that the possession of lands in fee-simple and uninterruptedly

(*l*) 4 Taunt. 826.

(*o*) 1 Cent. pl. 49.

(*m*) *Doe v. Jesson, ubi sup.*

(*p*) 3 Comm. 196.

(*n*) *Roe v. Rowleston*, 2 Taunt.

for sixty years, is at present a sufficient title against all the world, and cannot be impeached by any dormant claim whatsoever." This, however, Mr. Christian remarks, in a note to the above passage, is far from being universally true; for an uninterrupted possession for sixty years will not create a title, where the claimant or demandant had no right to enter within that time; as where an estate in tail, for life, or for years, continues above sixty years, still the reversioner may enter and recover the estate.

Perhaps this remark is not sufficiently pointed. Blackstone certainly did not mean, that the lawful possession, during sixty years, of a tenant in tail, for life, or for years, would operate as a bar to the reversioner's title, but he alluded to a clear adverse possession for sixty years.

However, even in this light, his position admits of exceptions. It is possible that an estate may be enjoyed adversely for hundreds of years, and may at last be recovered by a remainder-man. For instance, suppose an estate to be limited to one in tail, with remainder over to another in fee, and the tenant in tail to be barred of his remedy by the statutes of limitations, it is evident, that, as his estate subsists, the remainder-man's right of entry cannot take place until the failure of issue of the tenant in tail, which may not happen for an immense number of years.

This doctrine is illustrated by the great case of *Taylor v. Horde* (q), where an estate was settled on several persons successively in tail; remainder to A. in fee; and one of the remainder-men in tail, being out of possession, brought an ejectment, which was held to be barred by the statute of limitations. Afterwards all the tenants in tail died without issue, and the then heir at law of A. brought

(q) 1 Burr. 60; 5 Bro. P. C. 247; Cowper, 689.

an ejectment, within twenty years from the time his remainder fell into possession, and he recovered the estate.

5. After passing the act of 32 Henry VIII. and before that of the 21 Jac. I. although a man had been out of possession of land for sixty years, yet if his entry was not tolled, he might enter and bring any action of his own possession (*r*). Some writers have thought this still to be law (*s*), but the rule in this respect was altered by the statute of James; by which no person can now *enter* except within twenty years after his title accrues.

6. The rule in equity, that the statute of limitations does not bar a trust-estate, holds only as between *cestui que trust* and trustee, not between *cestui que trust* and trustee on one side, and strangers on the other; for that would be to make the statute of no force at all, because there is hardly an estate of consequence without such a trust, and so the act would never take place.

Therefore, where a *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against both (*t*).

7. Although the statute cannot, as between the trustee and *cestui que trust*, operate as a bar to the latter, yet the trustee may, in some cases, be barred by the possession of the *cestui que trust*, or those claiming under him (*u*). A *cestui que trust* is as a tenant at will to the trustee, and

(*r*) See Bevill's case, 4 Co. 11 b.

(*s*) See Wood's Inst. 557; and Christian's note to 3 Black. Com. 196.

(*t*) Per Lord Hardwicke, in *casu Llewellyn v. Mackworth*, Barnard. Rep. Cha. 445; 15 Vin. Abr. 125, n. to pl. 1; and see *Townsend v. Townsend*, 1 Bro. C. C. 550; *Clay v. Clay*, 3 Bro. C. C. 639, n.;

Ambl. 645; *Hercy v. Ballard*, 4 Bro. C. C. 469; and *Harmood v. Oglander*, 6 Ves. jun. 199; 8 Ves. jun. 106; *Hovenden v. Lord Annesley*, 2 Scho. & Lef. 629.

(*u*) See *Lord Portsmouth v. Lord Effingham*, 1 Ves. 430; *Harmood v. Oglander*, 6 Ves. jun. 199; 8 Ves. jun. 106. See 2 Mer. 360.

his possession is the possession of the trustee (*v*); and therefore, unless under very particular circumstances, time could not operate as a bar (*w*). Where a *cestui que trust* sells or devises the estate, and the vendee or devisee obtains possession of the title-deeds, and enters, and does no act recognising the trustee's title, there is great reason to contend that this is a disseisin of the trustee, and, consequently, that the statute will operate from the time of such entry. This is a point which daily occurs in practice; but it rarely happens, that a purchaser can be advised to dispense with the conveyance of a legal estate, where the defect will appear on the abstract when he sells. And where there has been any dealing on the legal estate, and it has been recently noticed in the title-deeds as a subsisting interest, it is clear that a purchaser must consider it as such (*x*).

8. The statutes of limitations certainly cannot operate as between *cestuis que trust*; but it seems that equity, in analogy to the statute, will hold time a bar (*y*); and indeed that equitable rights in general will, by the like analogy, be affected by time in the same manner as legal estates (*z*).

This is exemplified, in some degree, by the rules respecting an equity of redemption, which is a mere creature of the Court (*a*).

(*v*) See 1 Ventr. 329.

(*w*) See 3 Mod. 149; Earl of Pomfret v. Lord Windsor, 2 Ves. 472; Keene v. Deardon, 8 East, 248; Smith v. King, 16 East, 283.

(*x*) See Goodtitle v. Jones, 7 Term Rep. 47.

(*y*) See Harmood v. Oglander, *ubi sup.*

(*z*) See 1 Atk. 476; and Stackhouse v. Barnston, 10 Ves. jun.

466; Hovenden v. Lord Annesley, 2 Scho. & Lef. 630; Lord Egremont v. Hamilton, 1 Ball & Beaty, 516.

(*a*) White v. Ewer, 2 Ventr. 340; Pearson v. Pulley, 1 Cha. Ca. 109; Jenner v. Tracey, and Belch v. Harvey, 3 P. Wms. 287, n. See a full note of this case, Appendix, No. 15.

In *Clay v. Clay* (*b*), Lord Camden laid down this doctrine very clearly. He said, "as often as parliament has limited the time of actions and remedies, to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity. For when the Legislature has fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by parliament. And therefore, in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar."

In *Beckford v. Wade* (*c*), the late Master of the Rolls, in delivering judgment, said, that it is certainly true that no time bars a direct trust as between *cestui que trust* and trustee; but if it was meant to be asserted that a court of equity allows a man to make out a case of constructive trust, at any distance of time after the facts and circumstances happened out of which it arises, he was not aware that there was any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief.

And it seems that even in cases of fraud, where the facts constituting the fraud are known, where there is no

(*b*) 3 Bro. C. C. 639, n.; Ambl. O'Donel, 1 Ball & Beatty, 156.
645; and see *Ex parte Dewdney*, (c) 17 Ves. jun. 97. See 2 Hargr.
15 Ves. jun. 496; *Medlicott v. Jur. Exc. p. 394.*

ing trust or continuing influence, the same principle
ly (*d*).

Whilst the equity of redemption subsists, the ques-
whom it belongs must remain open : and therefore
possession without title will not give any person a
redeem (*e*). The right belongs to him who shows
although he has been out of possession upwards
y years. This was so held by Sir William Grant,
Thomas Plumer decided otherwise, and his deci-
sion affirmed in the House of Lords (*f*). And it
that unless in the case of disability twenty years
possession is a bar to relief in equity (*g*).

Legal provisions have been so strictly adhered to,
persons labouring under any of the disabilities spe-
cified in the statute of limitations, have been allowed the
relief they would be entitled to in the case of a legal
title.

These observations may be closed by observing,
that cases occur in which a title depending on the
statute of limitations can be recommended. The bare re-
tention of rent is no ouster, for it is a contradiction in
terms that a man by wrong should have my right (*i*) ;
non-payment of rent is no ouster, and therefore the
operation of the statute must frequently be prevented by

Ball & Beatty, 166.

Almondeley v. Clinton,
3.

Acc. & Walk. 1, 189 n.;

Tweddell v. Tweddell,
11, 12.

Price v. Copner, 1 Sim.
7.

Don v. Lytton, 2 Bro. C. C.

cases on this point were
time depending, Pimm
v. Pimm, before Lord Eldon,
the case before Lord Man-

ners, in Ireland. See 2 Mer. 240;
Blake v. Foster, 2 Ball & Beat.
565; Harrison v. Hollins, 1 Sim.
& Stu. 471.

(*i*) Gilb. Ten. 97. See acc.
Goodright v. Jones, Cruise on
Fines, 3d edit. 295; Doe v. Dan-
vers, 7 East, 299; and see Orrell
v. Maddox, Runnington's Eject.
458; Saunders v. Lord Annesley,
2 Scho. & Lef. 73. See and con-
sider Hovenden v. Lord Annesley,
2 Scho. & Lef. 623.

very of the conveyance was not a condition precedent, and it was compared to the case of *Hall v. Cazenove* (*d*), where a charter-party contained a covenant by the owner, that the ship should sail on a specified day, and the owner afterwards brought an action of covenant for the freight, it was held that he need not aver that the ship sailed on that day, although the defendant (the freighter) covenanted to pay the freight in consideration of every thing above mentioned. It was not necessary to decide the point, but Le Blanc, J. said, that it was clear that it was a condition precedent that a draft of the conveyance should be delivered to the purchaser; the question was, whether it must be done by a particular day. It was not necessary, however, to enter upon that question; if it were, it might perhaps be material to advert to the rule, that where a condition does not go to the whole consideration (*e*) of the contract, but to a part only, it is not a condition precedent. Bayley, J. was of the same opinion. It was not a condition precedent that the draft should be delivered by a particular day, for he did not consider the precise time of the delivery as an essential ingredient in that condition which was meant only to secure a delivery within a reasonable time.

The general opinion has always been, that the day fixed was imperative on the parties at law. This was so laid down by Lord Kenyon, and has never been doubted in practice. The contrary rule would lead to endless difficulties. In the above case, for example, the different times appointed, 1. for delivery of the abstract; 2. for the return of it; 3. for the delivery of the conveyance; 4. for the return of it; and 5. for the completion of the purchase, were all links of the same chain, and if one link were broken, the whole chain would be destroyed. If the

(*d*) 4 East, 477.

(*e*) See *Havelock v. Geddes*, 10 East, 564.

appointed for the delivery of the conveyance was not essential ingredient, but was meant only to secure a conveyance within a reasonable time, it follows that the same must apply to the time fixed for the return of it, and to the time appointed for the completion of the purchase. The effect of this rule would be, that the appointment of a day would have no effect, and in every case it would be referred to a jury to consider whether the act was done within a reasonable time. The precise contract of the parties would be avoided, in order to introduce an uncertain rule, which would lead to endless litigation. This cannot be compared to a case like *Hall v. Cazenove*: in that case the ship did sail without being countermanded, and the substance of the covenant was considered to be, that the ship should go to the place named on freight and return again, and if the freighter sustained any damage by reason of the ship not having sailed on the particular day, he might recover it by bringing an action on the covenant. If covenants in favour of justice were not considered as precedent on each other. It would be monstrous that the ship should be permitted to sail to the place named, and return again, and yet not earn any freight, because it did not sail on the day appointed. So where covenants go to a part of the consideration, and a breach may be made for in damages, the defendant has a remedy on the covenant, and shall not plead it as a condition precedent. In a covenant with *B.* to build a house for him according to a certain plan, and *B.* covenant with *A.* to pay for the house so built, it is clear, notwithstanding some authorities to the contrary, that if *A.* build a house, although not exactly according to the plan, yet *B.* must pay for it, and *A.* may recover in a distinct action against the builder for damage sustained by the departure from the plan. The justice of this is evident. But in the case under con-

sideration, the agreements go to the whole consideration on both sides; they are mutual conditions; the one precedent to the other (*f*). If the draft of the conveyance, for instance, is not delivered on the day appointed, the party who ought to deliver it has broken his agreement, and cannot therefore recover upon it at law. This works no injustice; for the further execution of the contract is at once stopped; the seller retains his estate, and the purchaser his purchase-money, and the party making default is liable, as he ought to be, to an action for breach of his engagement. It is to be hoped, therefore, that the day appointed will always be deemed of the essence of the contract at law. It has so been held in a recent case in the Common Pleas (*g*). And in a later case upon a sale of goods, where fourteen days were allowed from the day of sale *to the purchaser* to clear away the goods, the seller was not prepared to deliver them the day after the sale to the purchaser, who applied for them; and it was held, that he (the seller) had broken his agreement, and could not recover against the purchaser, who refused to perform the contract (*h*). But a party may even at law wave the forfeiture, and enlarge the time of his contract (*i*).

And *equity*, which from its peculiar jurisdiction is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will in certain cases carry the agreement into execution, notwithstanding that the time appointed be elapsed; for, as Lord Eldon remarks, the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, *not merely as to the*

(*f*) *Boone v. Eyre*, 1 H. 514; and see *Cornish v. Rowley*, Blackst. 273. See 10 East, 564. *post*.

(*g*) *Wilde v. Forte*, 4 Taunt. 334.

(*i*) *Carpenter v. Blandford*, 8 Barn. & Cress. 575.

(*h*) *Hagedon v. Laing*, 1 Marsh.

time, but an alteration of circumstances affecting the value of the thing ; or objections arising out of circumstances, *not merely as to the time*, but the conduct of the parties during the times ; unless the objection can be so sustained, many of the cases go the length of establishing, that the objections cannot be maintained (*k*). Perhaps there is cause to regret that even *equity* assumed this power of dispensing with the literal performance of contracts in cases like these.

Objections on account of delay seem divisible into two kinds. The one where the delay is attributable to the neglect of either party ; the other where the delay is unavoidably occasioned by the state of the title ; and of each of these we shall treat in its order.

SECTION I.

Of Delays occasioned by the Neglect of either Party.

THE time fixed on for the completion of a contract, was formerly paid less attention to in equity than it now is, which seems to have arisen from the case of *Gibson v. Paterson* (*l*), where, according to the report, a specific performance was decreed in favour of the plaintiff, the vendor, without any regard had to his negligence in not producing his title-deeds, &c. within the time limited. And Lord Hardwicke is reported to have said, that most of the cases which were brought into the Court, relating to the execution of articles for the sale of an estate, were of the same kind, and liable to that objection ; but that he thought there was nothing in the objection.

(*k*) *Per* Lord Eldon, see 7 Ves. Lennon v. Napper, 2 Scho. & jun. 274 ; and see *Hearne v. Lef.* 683.
 Tenant, 13 Ves. jun. 287. See (*l*) 1 Atk. 12.

It appears, however, that this case is mis-reported; for Lord Rosslyn, in *Lloyd v. Collet* (*m*), said he had looked into the case of *Gibson v. Paterson*, in which the reporter had made Lord Hardwicke treat the time as totally immaterial. He said, it was to be observed, that the circumstances of that case, of which he had taken a copy, did not call for any such opinion. The purchaser, who hung back, had bought an estate in mortgage. The contract took place in November, and was to be completed in February; in that time, therefore, the mortgage could only be paid off by treaty with the mortgagee. Upon the facts it appeared, that application had been made to the mortgagee, who consented to take his money. Drafts of conveyance were made, and countermanded by the purchaser. He had, after the contract, demised part of the estate to the vendor at a rent; and, upon application being made to him, every thing being ready, he said he would be off the bargain; he had no money to pay for it; and if they attempted to force him, he would go to Scotland to avoid it. Lord Rosslyn added, there could not be the smallest argument upon it, nor the least doubt about the decree.

But whatever opinion Lord Hardwicke entertained on this subject (*n*), it is now settled, that a man cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager; and therefore time alone is a sufficient bar to the aid of the Court.

Thus in a case (*o*) where the parties differed as to the construction of an agreement, and after a delay of seven

(*m*) 4 Ves. jun. 690, n.; and see 4 Bro. C. C. 497. See *Radcliffe v. Warrington*, 12 Ves. jun. 326; *Alley v. Deschamps*, 13 Ves. jun. 225.

(*n*) See 1 Ves. 450.

(*o*) *Milward v. Earl of Thanet*, 5 Ves. jun. 720, n. (*b*). See *Alley v. Deschamps*, 13 Ves. jun. 225.

years one of the parties filed a bill for a specific performance, it was dismissed merely on account of the staleness of the demand.

A bill for a specific performance is an application to the discretion, or rather to the extraordinary jurisdiction of equity, which cannot be exercised in favour of persons who have long slept upon their rights, and acquiesced in a title and possession adverse to their claim. Due diligence is necessary to call the Court into activity, and where it does not exist, a court of equity will not lend its assistance; it always discountenances laches and neglect (*p*).

If the vendor be not ready with his abstract and title-deeds at the day fixed, the purchaser may avoid the agreement at law.

Thus, in a case (*q*) where upon a sale it was agreed that a good title should be made out by the 10th of July; in the beginning of July the purchaser called on the vendor to show him the title-deeds; but he not having them in his possession, gave the purchaser an abstract of the title, which did not contain any of the deeds; and although it was suggested that an application ought to have been made to the vendor at an earlier period, yet Lord Kenyon ruled otherwise, as the seller, he said, ought to be prepared to produce his title-deeds at the particular day.

This rule does not, however, prevail in equity; for it is there considered equally incumbent on the purchaser to ask for the abstract, as for the vendor to deliver it. And, therefore, if a purchaser do not call for the abstract before the time agreed upon for its delivery (*r*), or do not ask for it until it has become impossible to execute the agreement by the day fixed (*s*), equity will consider the time as waved.

(*p*) *Per* Lord Manners, 1 Ball & Beatty, 68.

(*q*) *Berry v. Young*, 2 Esp. Ca. 640, n.; *vide supra*, p. 363.

(*r*) *Guest v. Homfrey*, 5 Ves. jun. 818.

(*s*) *Jones v. Price*, 3 Anstr. 924.

So, if the purchaser receive the abstract after the day appointed, and do not at the time object to the delay, he cannot afterwards insist upon it as a bar to a performance *in specie* (*t*).

It is, however, clearly settled, that a specific performance shall not be enforced, where no steps have been taken by the vendor, although in proper time urged by the purchaser to do so, and the purchaser, immediately when the time is elapsed, insists upon his deposit, and refuses to perform the agreement.

This was decided in *Lloyd v. Collett* (*u*); the case was, that on the 10th August 1792, the defendant contracted for the purchase of the estate, the purchase to be completed on or before the 25th of March 1793, and had frequently between those times applied for an abstract of title, but could not obtain one. Shortly after the 25th of March 1793, the purchaser applied for his deposit, with interest from the 10th of August 1792, when he paid it; and afterwards repeatedly applied for it before the 10th of June 1793, when he brought an action for the deposit. On the 16th September 1793, an abstract was delivered; the purchaser was then out of town, and on his return, on the 25th of October, wrote, insisting that he would not complete his purchase. On the 6th of November the bill was filed by the vendor for a specific performance, and for an injunction to restrain the proceedings at law. Lord Rosslyn said, the conduct of parties, inevitable accident, &c. might induce the Court to relieve; but it was a different thing to say, that the appointment of a day was to have no effect at all, and that it was not in the power of

(*t*) *Smith v. Burnam*, 2 Anstr. 527; and see *Seton v. Slade*, 7 Ves. jun. 265.

(*u*) 4 Bro. C. C. 469; 4 Ves. jun. 689. See 5 Ves. 737; 7 Ves.

jun. 278; and see *Pincke v. Curteis*, stated *infra*; *Potts v. Webb*, 4 Bro. C. C. 330, cited; *Paine v. Meller*, 6 Ves. jun. 349; and *Ward v. Jeffery*, 4 Price, 294.

the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it. And he therefore considered the contract as at an end.

But where a vendor has proceeded to make out his title, and has not been guilty of gross negligence, equity will assist him, although the title was not deduced at the time appointed.

Thus, in *Fordyce v. Ford* (*x*), the purchase was to be completed on the 30th July 1793. The abstract was not delivered until the 8th, and the treaty continued until the 25th of September, on which day the deeds were delivered, and every difficulty cleared up; when the purchaser refused to proceed, alleging that he wanted the estate for a residence for the last summer, and insisting he was not bound to go on, on account of the delay. The Master of the Rolls said, the rule certainly was, that where in a contract either party had been guilty of gross negligence, the Court would not lend its assistance to the completion of the contract; but in this case he thought there had been no such negligence, and decreed accordingly; adding, that he hoped it would not be gathered from thence, that a man was to enter into a contract, and think he was to have his own time to make out his title.

The rules on this subject apply, as they ought to do, to each party. And therefore, where a purchaser permits a long time to elapse, without evincing a fixed marked intention to carry his contract into execution, he will be left to his remedy at law, although he may have paid part of the purchase money. He is not to be suffered to lie by, and speculate on the estate rising in value (*y*). Nor will he be assisted by equity, where he has made frivolous

(*x*) 4 Bro. C. C. 494; *Radcliffe v. Warrington*, 13 Ves. jun. 323. Ves. jun. 686; *Alley v. Deschamps*, 13 Ves. jun. 225.

(*y*) *Harrington v. Wheeler*, 4

objections to the title, and trifled, or shown a backwardness to perform his part of the agreement, especially if circumstances are altered (*z*). And where the price is unreasonable or inadequate, or the contract is in other respects inequitable, equity will not assist either party, if he has permitted the day appointed for completing the contract to elapse without performing his part of the agreement (*a*).

The time, however, is more particularly attended to in sales of reversion; for it is of the essence of justice that such contracts should be executed immediately, and without delay. No man sells a reversion who is not distressed for money; and it is ridiculous to talk of making him a compensation by giving him interest on the purchase money during the delay (*b*).

So time is very material where the estate is sold in order to pay off any incumbrance bearing a higher rate of interest than the vendor is entitled to receive, in respect of the purchase money, during the delay (*c*); or the estate is sold for the purposes of a trade or manufactory (*d*); or the subject of the contract is in its nature of a fluctuating value (*e*).

(*z*) *Hayes v. Caryll*, 1 Bro. P. C. 27; 5 Vin. Abr. 538, pl. 18; *Spurrier v. Hancock*, 4 Ves. jun. 667; *Pope v. Simpson*, 5 Ves. jun. 145; and *Coward v. Odingsale*, 2 Eq. Ca. Abr. 688, pl. 5; and see *Green v. Wood*, 2 Vern. 632; *Bell v. Howard*, 9 Mod. 302; and *Main v. Melbourn*, 4 Ves. jun. 720.

(*a*) *Vide ante*, ch. 5; and *Whorwood v. Simpson*, 2 Vern. 186; *Lewis v. Lord Lechmere*, 10 Mod. 503.

(*b*) *Newman v. Rodgers*, 4 Bro. C. C. 391; and see *Spurrier v. Hancock*, 4 Ves. jun. 667.

(*c*) *Popham v. Eyre*, Lofft, 786; and see a case cited in 2 Scho. & Lef. 604.

(*d*) *Parker v. Frith*, 1 Sim. & Stu. 199; *Wright v. Howard*, *ib.* 190; *Coslake v. Tilt*, 1 Russ. 376.

(*e*) *Doloret v. Rothschild*, 1 Sim. & Stu. 590.

SECTION II.

Of Delays occasioned by the State of the Title.

may be laid down as a general proposition, that a delay accounted for on the above ground will not prevent specific performance being decreed, where the time fixed for completing the contract is not material. Thus, if an estate was described as in good repair, and it turned out to be in bad repair, and several months may be required to repair it, yet the purchaser cannot resist the contract on the ground of time, unless it could be clearly shown, that he wanted possession of the house to live in at a certain period, by which time the repairs could not be completed (*f*). So if the estate is in lease, and it was stipulated that the purchaser would be entitled to possession several months before the lease actually expire, yet he cannot rescind the agreement, unless the personal occupation of the estate was essential to him at the time stipulated (*g*).

Where time is not material, and the title is bad, but the defect can be cured, if the vendee is unwilling to stay, the vendor should file a bill in equity to enforce the performance of the contract (*h*); for it is sufficient if the party coming into articles to sell has a good title at the time of the decree; the direction of the Court being, in all these cases, to inquire whether the seller *can*, not whether he *has* made a title at the time of executing the agreement.

This principle was followed in a case of frequent refer-

^f See *Dyer v. Hargrave*, 10 and see 13 Ves. jun. 77.

jun. 505, *supra*, p. 267.

(*h*) See 6 Ves. jun. 655; 10 Ves.

Hall v. Smith, Rolls, 18 Dec. jun. 315.

MS.; S. C. 14 Ves. jun. 426;

ence (*i*). And in a late case (*k*), the vendor, at the time he filed the bill for a specific performance, had only a term of years in the estate, of which he had articted to sell the fee-simple, and after the bill was filed, procured the fee by means of an act of parliament; and as the day on which the contract was to be carried into execution was not material, a specific performance was decreed.

The same rule prevails at law, *where no time is fixed for completing the contract*, and an application for the title has not been made by the purchaser previously to an action by the vendor for breach of contract. For in *Thompson v. Miles* (*l*), a man agreed to sell a term of which he stated forty years to be unexpired. It appeared there were only thirty-nine, but by an agreement indorsed on the lease, the lessor agreed to add one year to the unexpired term. This agreement was dated after an action brought by the vendor for damages on breach of agreement; and Lord Kenyon ruled, that the vendor having at that time a good title was sufficient. His Lordship said, that it had been solemnly adjudged, that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of parliament gets such an estate as will enable him to make a title, that is sufficient: that here the plaintiff being enabled to make a title, and the defendant never having applied for it, he should not be allowed to set up against the plaintiff a want of title, though the power of making that title was obtained after the action was brought.

But if the vendor cannot verify his abstract at the time appointed, or if he produce a defective title, and the purchaser bring an action for recovery of the deposit, the

(*i*) *Langford v. Pitt*, 2 P. Wms. 629; and see *Jenkins v. Hiles*, 6 Ves. jun. 646; *Seton v. Slade*, 7 Ves. jun. 265.

(*k*) *Wynn v. Morgan*, 7 Ves. jun. 202.

(*l*) 1 Esp. Ca. 184.

endor having a title at the time of the trial will not avail him. Thus, in *Cornish v. Rowley* (*m*), where a purchaser sought to recover his deposit, it appeared that the abstract of the title began in the year 1793, and after reciting that the deeds relating to the estate had been lost, stated fine and nonclaim. Upon inquiry, it was found that the lot of the deeds having been lost was not true. The counsel for the defendant said they were ready to make out a good title. Lord Kenyon said, that the vendor must be prepared to make out a good title on the day when the purchase is to be completed. Indulgence, he was aware, was often given for the purpose of procuring probates of wills, &c. But this indulgence was voluntary on the part of the intended purchaser. It is the duty of the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed. If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it. No man was ever induced to take a title like the present. A fine and nonclaim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favour of infants, femmes covert, &c. As a good title was not made out at the day fixed, he should direct the jury to find a verdict for the deposit, with interest up to that day. And a verdict was found by the jury accordingly.

So, in *Bartlett v. Tuchin* (*n*), assignees of a bankrupt sold an estate, and no time was fixed for completing the purchase. The purchaser upon a supposed defect of title abandoned the contract; *afterwards* the commission was superseded, and a new one issued, under which the same assignees were chosen. It was held that the purchaser might rescind the contract, for at the time he gave notice

(*m*) B. R. Midd. Sitt. after
T. 40 Geo. III.; 1 Selw. N. P.
10.

(*n*) 1 Marsh. 583. See *Goodwin*
v. Lightbody, 1 Dan. 153; *Roper*
v. Coombes, 6 Barn. & Ald. 584.

of his abandonment of the contract, the assignees could not make out a good title. And in a late case (*o*), the facts were, that upon a sale it was agreed that the purchase-money should be paid on or before Lady-day 1803, on having a good title. The vendors were assignees of a bankrupt who claimed under a will. They thought that he had an estate-tail under the will, and that therefore they could make a title; but under the devise he only took for life, with contingent remainders over. The bankrupt, however, being heir at law of the testator, could make a title by levying a fine, and was willing to join; but these facts were not stated in the abstract delivered, or communicated to the purchaser until a fortnight before the assizes. The Court, after showing that the bankrupt took only an estate for life under the devise to him, said, as it was stated, that previous to the time fixed for payment of the money, and completion of the purchase, or indeed till near the time of trial, no information was given to the purchaser that the bankrupt was heir at law of the testator, but the title of the assignees appeared to have been delivered in, on the supposition of the bankrupt being tenant in tail, they thought that the defendant had failed in making good the agreement on his part; and that thereupon a right of action at law had accrued to the plaintiff. How far the title since communicated might in another course of proceeding in another place, render the present proceeding abortive; and whether the plaintiff might not be ultimately compelled to fulfil his agreement, was not for them in that action to decide.

In an early case (*p*) the Court of Chancery carried this

(*o*) *Seward v. Willock*, 5 East, 198; 1 Smith's Rep. 390, S. C.; and see *Radcliffe v. Warrington*, 12 Ves. jun. 326, where the purchaser recovered at law.

(*p*) *Lord Stourton v. Sir Thomas Meers*, stated in 2 P. Wms. 631; and see *Sheffield v. Lord Mulgrave*, 2 Ves. jun. 526; *Ormerod v. Hardman*, 5 Ves. jun. 722.

doctrine very far; for at the time of the articles for sale, or even when the decree was pronounced, Lord Stourton, the vendor, could not make a title, the reversion in fee being in the Crown; and yet the Court indulged him with time more than once for the getting in the title from the Crown, which could not be effected without an act of parliament, to be obtained in the following session; however, it was at length procured, and Sir Thomas Meers decreed to be the purchaser (I); and even at this day, although the Master report against the title, yet if it appear that he will have a title upon getting in a term, or procuring letters of administration, &c. the Court will not release the purchaser; but will put the vendor under terms to complete his title speedily (*p*). Or if a new fact appear which enables him to make a title when the cause is before the Court on further directions, the contract will be enforced (*q*), but the Court will not extend the rule which it has adopted of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it has not already been applied. Therefore in a case where upon a creditor's bill filed for sale of the real estate of a trader, the usual accounts were decreed and a sale ordered, and the estates were accordingly sold; but it afterwards appeared that the fact of the trading was not regularly proved, and then the cause was reheard, the decree upon which rehearing was also open to objection; the purchaser under the decree was upon motion relieved from his purchase, although

(*p*) *Coffin v. Cooper*, 14 Ves. jun. 205.

(*q*) *Esdaile v. Stephenson*, 8 Aug. 1822, MS. *supra*, p. 208.

(I) Note, it appears that Sir Thomas Meers was mortgagee of the estate; (see *Sir Thomas Meers v. Lord Stourton*, 1 P. Wms. 46,) and it is therefore probable that at the time he entered into the contract he was aware of the defects in the title.

the parties were willing to take steps to remove the objections (*r*).

And where a purchaser enters into, or proceeds in a treaty, after he is acquainted with defects in the title, and knows that the vendor's ability to make a good title depends on the defects being cured, he will be held to his bargain, although the time appointed for completing the contract is expired and *considerable further time* may be required to make a good title.

Thus in a case (*s*), where it was agreed upon a purchase, that it should be completed on the 5th April 1792, it appeared that the purchaser had applied for an abstract at the latter end of January, or the beginning of February, which not being sent to him, he, after the expiration of the time for the completion of the purchase, applied for his deposit, saying, that he should not proceed in his purchase. About the 21st of April, an abstract was sent him, and it appeared that a suit in Chancery must be determined before a title could be made, upon which he again declared he would not proceed in the purchase, and again required his deposit. In Trinity term he brought an action for his deposit, and, on the 6th of November, the bill was filed. The purchaser, by his answer, stated that the suit was still depending, and that questions of law had arisen, which then stood for argument in the Court of King's Bench.

The Lords Commissioners Ashhurst and Wilson granted an injunction, which was continued by Lord Rosslyn, who said, in these contracts (sales by auction) in general, the time of completing the contract is specified, and a deposit

(*r*) *Lechmere v. Brasier*, 2 Jac. & Walk. 287.

(*s*) *Pincke v. Curteis*, 4 Bro. C. C. 329; and see *Smith v. Burnam*, 2 Anstr. 527; and *Paine v.*

Meller, 6 Ves. jun. 349; *Warde v. Jeffery*, 4 Price, 295; see *Smith v. Sir Thomas Dolman*, 6 Bro. P. C. 291, by Tomlins.

is paid ; and if the title is not made out by the time, the vendee is entitled to take back his deposit. But in this case *the vendee was apprised of the title depending on the ability of the vendors to make a good title, which itself depended on the event of a Chancery suit, and was, notwithstanding, willing to go on with his purchase ; there had been a communication of the delay of the suit, and the present bill was filed after great delay* (I). If the vendee had called for his deposit at the end of the time limited for completing the purchase, and insisted he would not go on with his purchase, the Court would not have compelled him. The cause was afterwards heard before the Master of the Rolls, who was also of opinion, that there had been a sufficient communication of the real state of the delay, and that the purchaser had acquiesced in it, or at least not sufficiently declared his dissent to go on with the purchase ; and therefore it was referred to the Master to inquire as to the title.

So in *Seton v. Slade* (*t*), it appeared that the purchaser was aware of the objections to the title at the time he purchased the estate, and afterwards accepted the abstract within a few days of the time appointed for completing the contract. He had, however, previously declared, that if the title was not made out by the time, he would relinquish the contract ; and the day after the time appointed he actually applied for his deposit, alleging that the abstract, so far from showing a right in the vendor to convey, stated merely a contract for the purchase by him, without noticing a suit in Chancery. But the purchaser having been aware of the objections to the title, and having

(*t*) 7 Ves. jun. 265. See *Wood v. Bernal*, 19 Ves. 220.

(I) The judgment shows the true ground of the decree ; but according to the state of facts in the report, the case was similar to that of *Lloyd v. Collet*, stated, *supra*, p. 364.

afterwards received the abstract, a specific performance was decreed.

Although a treaty may have lain dormant for some time, yet if the contract is not abandoned, a performance will be decreed *in specie*.

Thus in a case (*u*) where, upon objections to a title, the treaty had proceeded for about two years, when the vendor's solicitor wrote, calling for a distinct answer, saying, that otherwise he must be under the necessity of filing a bill. No answer was returned to the letter, nor was any notice given that the purchaser considered the contract as abandoned; neither had he brought any action for the deposit. The bill was filed after a delay of about fourteen months, and the defendant resisted a specific performance on the ground of delay, by which, he stated, he had suffered material inconvenience, having purchased the place as his residence, and that he was induced to consider the contract as abandoned. A specific performance was however decreed.

But if a purchaser object to the title, and declare he will not complete the contract, and the vendor acquiesce in this declaration, he cannot afterwards clear up the objections to his title, and compel the purchaser to perform the agreement. This was decided in the case of *Guest v. Homfray* (*x*). The purchaser took objections to the title, and was informed that no better title could be made; whereupon he said, he would not proceed in the purchase, and afterwards returned the abstract, at the desire of the vendor, at the same time acquainting him (the vendor) that he (the purchaser) still considered the contract was at an end. In about eight months after this the abstract was returned, with the objections answered, and the bill was filed upon the defendant refusing to com-

(*u*) *Marquis of Hertford v. Boore*, *Earl of Thanet*, 5 Ves. jun. 720, 5 Ves. jun. 719. See *Milward v. n. (b)*. (*x*) 5 Ves. jun. 818.

plete the contract. But the bill was dismissed, although it was clear that the purchaser had almost all the time wished to be off the bargain. Lord Alvanley, then Master of the Rolls, said, they should have cautioned the purchaser, and told him they were going on to make out a title. If they had done all that, and shown a probable ground to the purchaser that they might make a good title, Lord Alvanley said, he should perhaps not have thought a year too long.

Where circumstances are such that the purchase-money cannot be paid for a length of time, as if the purchaser die, or become bankrupt before the contract be carried into effect, and his executors, or assignees, are not able to get in the assets or effects, the vendor is entitled to require the contract to be rescinded, and he will be allowed his costs (*y*): or he may demand a specific performance; and if the defendants are unable or unwilling to perform the contract, that the estates may be resold; and if the purchase-money arising by the resale, together with the deposit, shall not amount to the purchase-money, that the defendant may pay the deficiency.—A bill for the latter purposes was filed by a vendor against the assignees of a bankrupt, and a decree was made for resale. The deficiency upon that resale was 5,016*l.*; and the cause coming on for further directions, Lord Rosslyn directed that sum to be proved under the commission; saying, the whole purchase-money was the debt, and the vendor had a lien on the estate (*z*); which proving by the resale deficient, the residue was to be proved under the commission (*a*).

(*y*) *Mackreth v. Marlar*, 1 Cox, 396; *Dickinson v. Heron*, *infra*, 259; Cox's n. (1) to 2 P.Wms. 67; ch. 10.
Whittaker v. Whittaker, 4 Bro. C. C. 31. See Sir James Lowther v. Lady Andover, 1 Bro. C. C. (z) *Vide supra*, ch. 1.
 (a) *Bowles v. Rogers*, 6 Vea. jun. 95, n.

In a late case, where an estate was sold by auction, in order to pay off incumbrances, under the usual conditions, and the purchase was to be completed on the 25th of March 1805, the estate was sold for 123,000 *l.* and the purchaser paid only 4,000 *l.* as a deposit, when he ought to have paid 24,000 *l.* A short time previously to Lady-day he wrote a letter to the vendors, acknowledging his inability to pay, and requesting them to join in a resale, offering to pay any loss by the second sale. This they refused; and he not having the money ready, on the 27th of March 1805, filed a bill for a specific performance, evidently to gain time. The vendors filed a cross-bill; and afterwards the purchaser became a bankrupt, when the causes were revived. The expenses of the vendors, in payment of the auction-duty, &c. were very considerable. The cross cause came on first, the assignees of course could not bind themselves to pay the money; and the contract was decreed to be delivered up and cancelled, so that the vendors became entitled to the 4,000 *l.* deposit (*b*).

We are now to consider whether equity will permit the parties to make time the essence of the contract.

In *Williams v. Thompson or Bonham* (*c*), the bill was to carry into execution the trusts of a will, and for a specific performance of an agreement by Bonham, to purchase a real estate of the defendants. By the agreement, dated the 9th of July 1778, it was particularly expressed, "that in case a good title to the premises, discharged from all claims and demands whatsoever, should not be made out to the satisfaction of Bonham within three years from the date thereof, the agreement thereby made,

(*b*) *Steadman v. Lord Galloway*, Newl. Contr. 238, stated. See *et contra*, Rolls, 9th Feb. 1808. the case in Lib. Reg. B. 1781,

(*c*) 4 Bro. C. C. 331, cited; fol. 564.

so far as concerned the purchase of the premises, (for the agreement contained other stipulations), should from thenceforth become void." The defendant was always ready to have completed his purchase, but the trustees under the will were incapable of making out a title without the aid of equity, and for that purpose the bill in question was filed in February 1781. The cause came to a hearing on the 29th of June 1782, when the defendant (Bonham) insisted, that the title not having been made out at the time mentioned in the agreement, he was discharged from his purchase. But Lord Thurlow was of opinion, that the time fixed by the articles for making a title to the defendant was only formal, and not of the essence of the agreement; and, as appears by the Registrar's book, he declared, that the three years being expired was not a sufficient objection to the agreement being performed.

This case depends so much on its own complicated circumstances, as scarcely to admit of being cited as an authority which should rule any other case. I find, from the Registrar's book, that it was impossible to make a title without a decree. The agreement, which was very long and special, stated all the facts; and it was expressly stipulated, that the trustees should use their utmost endeavours to obtain a decree, and the purchaser was immediately let into possession. Now the bill was filed before the expiration of the three years, no laches was imputed to the trustees, and it did not appear that the purchaser had sustained any loss, or been put to any inconvenience. It would therefore have been a strong measure to hold, that the time was of the essence of the contract. The purchaser entered into the contract with full knowledge of all the obstacles in the way of making a title; and unless the purchase was completed,

there was no mode of indemnifying the trustees for the expense incurred by the Chancery suit.

In the case of *Gregson v. Riddle* (*d*), which was also before Lord Thurlow, the agreement was for a particular day ; with a proviso, that in case the title should not be approved in two months, the agreement was to be void and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for that purpose, to have the legal estate conveyed. The defendant resisting, a reference was directed, to see whether a good title could be made ; Lord Loughborough, then Lord Commissioner, expressing an opinion, that the terms of the agreement were complied with (I). The report was in favour of the title. The cause coming on before Lord Thurlow, the performance was still resisted. Lord Thurlow said, it had been often attempted to get rid of agreements upon this ground, but never with success. The utmost extent was to hold it evidence of a waver of the agreement ; but it never was held to make it void. Mr. Mansfield, for the defendant, said, the intention was clearly to make it void ; and that it would be necessary to insert a clause, that notwithstanding the decision of the Court of Chancery, it should be void. Lord Thurlow said, such a clause might be inserted ; *and the parties would be just as forward as they were then.*

On this *dictum* it must be remarked, that the case did not call for it, as the agreement appears to have been

(*d*) 7 Ves. jun. 268, cited.

(I) The stipulation was, that in case the title should not be approved of by the purchaser's counsel within two months, the articles should be void. The difficulty upon the title arose upon a settlement which the seller insisted was voluntary, and not upon a mere outstanding legal estate. The *seller* insisted upon being at liberty to rescind the contract, under the clause in the articles.

substantially performed within the time. And it is said, that in *Potts v. Webb*, before Lord Thurlow, it being part of the terms that the purchase should be completed by a certain time, his Lordship thought that a good reason for not decreeing a specific performance (*e*). At the same time it must be admitted, that Lord Thurlow entertained a floating opinion, that time could not in general be made of the essence of the contract. It does not appear, however, that any case ever came before him in which he was called upon to decide the point, and his opinion has not been followed in subsequent cases.

For in *Lloyd v. Collet* (*f*), in which the case of *Gregson v. Riddle* was cited, Lord Chancellor Loughborough said, the conduct of the parties, inevitable accident, &c. might induce the Court to relieve; but it was a different thing to say the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it.

And in the late case of *Seton v. Slade* (*g*), Lord Eldon said, he inclined much to think, notwithstanding what was said in *Gregson v. Riddle*, that time may be made the essence of the contract.

The case under consideration has been assimilated to a mortgage, where, although the parties may have expressly stipulated, that if the money be not paid at a particular time, the mortgagor shall be foreclosed, yet equity will permit him to redeem, in the same manner as if no such stipulation had been entered into. There does not appear

(*e*) 4 Bro. C. C. 330, cited.

(*f*) 4 Bro. C. C. 469; 4 Ves. jun. 689; note stated *supra*.

(*g*) 7 Ves. jun. 265; and see *Lewis v. Lord Lechmere*, 10 Mod.

503. See also 3 Ves. jun. 693; 12 Ves. jun. 333; 13 Ves. jun. 289; 2 Mer. 140; *Levy v. Lindo*, 3 Mer. 81; *Warde v. Jeffery*, 4 Price, 294.

to be any analogy between the cases. In a mortgage such a declaration is inserted by the mortgagee for his own advantage; but as the land is merely a security for the debt, equity rightly considers that a mortgagee ought only to require his principal and interest, and not to obtain the estate itself, by taking advantage of the necessities of the mortgagor. Once a mortgage and always a mortgage, has therefore become a maxim; and under this axiom equity is indeed administered; the parties being put in possession of their respective rights without detriment to each other. The same reasoning seems to apply to relief against a penalty. But in an agreement for sale of an estate, where it is expressly declared that the contract shall be void if a title cannot be made by a stated time, the parties themselves have *mutually* fixed upon the time; the *bona fides* of such a transaction seems to be a bar to the interference of a court of equity; and if the contract be vacated by virtue of the agreement, the parties will still be in the possession of their respective rights. We may therefore, perhaps, venture to assert, that if it *clearly appear to be the intention of the parties* to an agreement, that time shall be deemed of the essence of the contract, it must be so considered in equity (*h*). In the late case of *Hudson v. Bartram* (*i*), the Vice-Chancellor, (Sir John Leach) said, that the principle was admitted now that time may be made of the essence of the contract. Why are not parties to insert such a stipulation in their contract? It is difficult to understand how the doubt arose, but it is now at an end; and in the later case of *Williams v. Edwards*, where it was stipulated by the contract that if the counsel of the purchaser should be of opinion that a marketable title could not be made by the time thereby

(*h*) See Appendix, No. 6.

3 Madd. 440; and see *Boehm v.*

(*i*) 12 Dec. 1818, M.S.; S. C. Wood, 1 Jac. & Walk. 419.

appointed for the completion of the purchase, the agreement should be void, and delivered up to be cancelled. The counsel of the purchaser was of opinion that the seller was only tenant for life of certain shares of the estate, and a bill filed by the purchaser for a specific performance, with a compensation, was dismissed with costs (*k*).

It remains to observe, that *where no time is limited for the performance of the agreement*, the cases considered under the first division in this chapter will assist the students in forming a judgment in what instances equity will assist a party who has been guilty of laches, although every case of this nature must in a great measure depend upon its own particular circumstances. The cases classed under the second division apply, however, with greater force to cases where no time is limited than to those where a day is fixed, for in the former cases, the Court has not to struggle against an express stipulation of the parties.

A case came before the Lords Commissioners in 1792 (*l*), where no time was limited for performing the agreement. The plaintiff was one of two devisees in trust to sell, and pay debts, and had alone sold the estate (*l*), and entered into articles with the defendant. The co-trustee afterwards refused to join ; and there was a mortgagee who refused to be paid off. Neither of these circumstances was disclosed to the purchaser, and upon this delay in the title he proceeded to bring his action against the vendor for a breach of the agreement. The plaintiff brought his bill to

(*k*) *Williams v. Edwards*, 2 Sim. Contr. 236. See the case in Reg. Lib. B. 1792, fo. 28, nom. *Tyrer v. Bailey*.
 78.
 (*l*) *Tyrer v. Artingstall*, Newl.

(*l*) The estate was sold by auction *with the concurrence of the other trustee*. The plaintiff, however, alone signed the agreement.

compel a specific performance, and to have the co-trustee join ; and the mortgage redeemed, and to stay the action. The defendant suffered an injunction to go against him for want of an answer ; and having afterwards answered, a motion was made to dissolve the injunction ; and the cause shown by the plaintiff was, the possibility of making a good title by this very suit. The Court held the purchaser bound, and continued the injunction.

In this case it appears from the Registrar's book, that the purchaser insisted on his purchase, and that the injunction should be dissolved ; which was certainly a very important feature in the cause. It was not the case of a man merely seeking to recover his deposit. It must, however, be repeated, that it is impossible to lay down any general rule applicable to cases where no time is appointed for performing the agreement. Indeed, throughout this chapter, it has been found impossible to treat the subject of it in an elementary manner.

CHAPTER IX.

OF THE ABSTRACT AND CONVEYANCE : THE ASSIGNMENTS OF TERMS, ATTESTED COPIES AND COVENANTS FOR TITLE, TO WHICH A PURCHASER IS ENTITLED : OF SEARCHING FOR INCUMBRANCES : AND OF RELIEF IN RESPECT OF INCUMBRANCES.

SECTION I.

Of the Abstract and Conveyance.

THE vendor must at his own expense furnish the purchaser with an *abstract* of his muniments (I), and deduce clear title to the estate. The abstract ought to mention every incumbrance whatever affecting the estate, and should, therefore, contain an account of every judgment by which the estate is affected (*a*); but equity considers it complete whenever it appears, that upon certain acts alone, the legal and equitable estates will be in the purchaser; which may be long before the title can be completed (*b*). This rule, however, is properly confined to cases where the seller, and persons who are trustees for him, can make a title; for if the concurrence of a stranger is necessary, and he is not bound to join, the abstract

(*a*) *Richards v. Barton*, 1 Esp. Ca. 268.

(*b*) See 8 Ves. jun. 436; and 1 Jac. & Walk. 421.

(I) Formerly the title-deeds themselves were delivered to the purchaser, and his solicitor prepared the abstract at his expense; and the abstract was compared with the title-deeds by the counsel before whom it was laid. See *Temple v. Brown*, 6 Taunt. 60.

cannot be deemed perfect until it shows that he has given perfection to the title (c).

The abstract is delivered for the following purposes: 1st, That the purchaser may see whether the title is such as he will accept. He has also a right to it after he has taken an opinion, in order to take another opinion in case he is not satisfied with that, and for the purpose of taking further objections, and of further considering the title. He must have it too for another purpose, to assist him in preparing his conveyance, that he may see who must be made parties, what form of conveyance is expedient, what parcels are to be inserted, and the like (d). As to the general property in the abstract, it is hard to say who may have it; while the contract is open, it is neither in the vendor nor in the vendee absolutely; but, if the sale goes on, it is the property of the vendee; if the sale is broken off, it is the property of the vendor. In the mean time the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to show on what ground he did reject the title (e). If the purchase go off, not only is the abstract to be returned, but no copy to be kept, lest it should be used for a mischievous purpose (f); and although the purchaser pays for the opinion, yet, for the same reason, that ought, it should seem, to be returned with the abstract (g).

In a case where the purchaser returned the abstract to the seller, to answer the queries and opinion of counsel, it was held, that he (the purchaser) might maintain trover against the seller for the abstract, although the seller

(c) *Lewin v. Guest*, 1 Russ. 325.

(d) See 2 Taunt. 276, *per* Mansfield, C. J.

(e) 2 Taunt. 278, *per* Chamber, J.

(f) 2 Taunt. 277, *per* Lawrence, J.

(g) See and consider 2 Taunt. 270, *per* Mansfield, C. J.

himself might ultimately be entitled to the abstract. The temporary property of the purchaser in the abstract was sufficient to enable him to maintain the action (*h*).

The seller is bound to produce the deeds, in order that the abstract may be examined with them, although they are not in his possession, and the purchaser is not to be entitled to the custody of them. But, if they are in the possession of a third person, the purchaser's solicitor, it seems, must send to the place where the deeds are, in order to examine them with the abstract, and the seller must pay the expense of the journey (*i*), (I).

The strict rule seems to be, that the vendor must procure the fee to be vested either in himself, or a trustee for him ; and that a purchaser is not compellable to bear the expense of a long conveyance, on account of the legal estate having been outstanding for a length of time, or of the estate being subject to incumbrances which are to be paid off (*k*). It is not, however, very usual to insist upon this, unless the title cannot be perfected without a private act of parliament ; in which case, the expense of obtaining it is always borne by the vendor.

(*h*) Roberts v. Wyatt, 2 Taunt. 268.

(*i*) Sharp v. Page, Rolls, 1315, MS.

(*k*) See 1 H. Blackst. 280.

(I) Sale by assignees of a bankrupt. A settlement of 1763 was in the possession of a former purchaser, and there was only a covenant to produce a copy of it. A bill was filed by the assignees for a specific performance. The purchaser was informed that the settlement was in the possession of a gentleman in the country, *and might be seen there*. He was ready to covenant to produce it. The purchaser submitted to the Master that it was the duty of the sellers to produce the deeds stated in the abstract before the Master, or to the purchaser's solicitor in London. The Master stated, that he would make inquiry of conveyancers, what the practice in such cases was, and afterwards decided, that the purchaser's solicitor ought to send to Baldock, where the deeds were, to compare the abstract with the settlement, but that the sellers ought to pay the expenses of such journey.

Unless there be an express stipulation to the contrary, the expense of the conveyance falls on the purchaser (*l*); who, as we have already seen, must in that case prepare and tender the conveyance (*m*). The expense attending the *execution* of the conveyance is, however, always borne by the vendor.

If the estate be copyhold, the purchaser must bear the expense both of the surrender to him and of his admission (*n*); and a vendor is not obliged to pay the fine due on the *admission* of the vendee, although he covenant to surrender and assure the copyholds at his own costs and charges (*o*); because, it is said, the title is perfected by the admittance, and the fine is not due till after (*p*).

If a draft be altered by either party, although the alteration be such as would be supported by the Courts, yet the draft as altered should not be ingrossed without a communication being first made to the other party (*q*).

A purchaser has a right to require the vendor himself to surrender the estate, if copyhold, and to execute the conveyance, if freehold; and he cannot be compelled to accept either a surrender, or conveyance, under a power of attorney, unless an actual necessity appears for it (*r*);

(*l*) See 2 Ves. jun. 155; and *note*, this is the universal practice of the Profession.

(*m*) *Supra*, ch. 4.

(*n*) *Drury v. Man*, 1 Atk. 95, Sanders's edition.

(*o*) *Graham v. Sime*, 1 East, 632.

(*p*) *Dalton v. Hammond*, 4 Co. 28 a; *Rex v. Lord of the Manor of Hendon*, 2 Term Rep. 484; and see *Fishe v. Rogers*, 1 Rol. Abr. 506, (A.) pl. 1; 3 Burr. 1543; *Lex Cust.* p. 163; *Wood's Inst.* p. 137; *Gilb. Ten.* 205; 1 *Watk. Copy.* 286; *sed qu.* and see *Dalton v. Hammond*, Cro.

Eliz. 779; *Mo.* 622, pl. 851; and *supp. to Co. Copy.* s. 10; and *Parkins v. Titus*, MS. In the first edition, the author cited *Willowes's case*, 13 Rep. 1, as subversive of the authority of *Dalton v. Hammond*, as reported in *Coke*; but upon further consideration he is satisfied that he was wrong.

(*q*) See *Staines v. Morris*, 1 Ves. & Bea. 15.

(*r*) *Mitchel v. Neale*, 2 Ves. 679; *Richards v. Barton*, 1 Esp. Ca. 268; and see *ibid.* 115; *Noel v. Weston*, 6 Madd. 50.

for it tends to multiply his proofs, and he may be put under difficulties by these means ; the letter of attorney may be lost, and the party is obliged to prove the execution of it (*s*). A letter of attorney may be revoked the next moment, that revocation may be notified to the attorney without the purchaser's knowledge, and then the conveyance would be void ; and the purchaser's only remedy would be a suit in equity (*t*).

Besides, the vendor may be dead at the time the power is exercised, and in that case the execution would be void, as a power of this nature expires by the death of the principal (*u*). For this reason, where a purchaser chooses to permit the conveyance to be executed by attorney, the attorney should execute a declaration of trust, that he will stand possessed of the purchase-money in trust for the purchaser, until it either appear by satisfactory evidence, that the vendor was alive at the time of the execution of the deed, or if he shall be dead, until the estate is duly conveyed to the purchaser.

As a purchaser cannot be required to take a conveyance executed by attorney, so, on the other hand, if a vendor only covenant to surrender or convey lands to a purchaser upon request, he is not compellable to appoint an attorney for that purpose (*x*).

Where the estate lies in a register county, the conveyance should be registered as soon as it is executed. Mr. Hilliard remarks (*y*) that, by the statutes for registry, there is no time limited for registering deeds ; and that it is therefore obvious from an inspection of the acts, how

(*s*) See *Johnson v. Mason*, 1 Esp. Ca. 89.

(*t*) *Per* Lord Hardwicke, in *casu Mitchel v. Neale*, *ubi sup.* As to the revocation of a power of attorney, see *Walsh v. Whitcomb*, 2 Esp. Ca. 565.

(*u*) *Shipman v. Thompson*, *Wynne v. Thomas*, Willes, 105, 565 ; *Wallace v. Cooke*, 5 Esp. Ca. 117.

(*x*) *Symms v. Lady Smith*, Cro. Car. 299 ; *Godb.* 445.

(*y*) N. (2) to *Shep. Touch.* 116.

necessary it is, *that deeds should be registered immediately on their being executed*: to enforce this the more strongly, he adds, it may not be useless to consider, if a subsequent conveyance or mortgage should be executed for a valuable consideration, and from an almost momentary inattention or delay of the first vendee, or mortgagee, in not immediately registering, the second vendee or mortgagee should register first; whether, in such case, the first vendee or mortgagee doth not thereby become in a worse situation than he would have been by law, in case the registering acts had not been made.

It is very clear that in the case put, the subsequent purchaser or mortgagee, unless he had notice, would prevail over the first vendee or mortgagee. And it must be remarked, that, by delaying to register his conveyance, a purchaser gives a prior incumbrancer, who may have neglected to register his incumbrance, an opportunity of retrieving his error, and thereby establishing his demand on the estate; for the acts only say that deeds shall be void, *unless* such memorial thereof is registered, as by the acts is directed, *before the registering the memorial under which the subsequent purchaser claims* (z).

It appears, therefore, that there are two cogent reasons why a memorial of the conveyance should be duly registered *immediately* after the execution of the conveyance; the one, that a prior incumbrancer might, during the delay, register his incumbrance; the other, that the delay might give an unprincipled vendor an opportunity of selling the estate to a *bonâ fide* vendee without notice; who, if he registered his deeds before the registry of the first conveyance, would certainly prevail against the first purchaser.

(z) *Vide infra* in this chapter, and chapter 16.

SECTION II.

Of Assignments of Terms.

A PURCHASER may require an assignment of all outstanding terms, of which he could avail himself in ejectment, to attend the inheritance; and if the purchaser leave them outstanding, he may not, perhaps, have the full enjoyment of his estate, without, at some future period, being himself at the expense of getting them in: for even a mortgagee would be very unwilling to advance money on the estate, unless the terms were assigned, lest a subsequent mortgagee or purchaser, without notice, should obtain an assignment of them, and so over-reach the prior mortgage.

I. The position that a purchaser may require an assignment of all outstanding terms, *of which he can avail himself in ejectment*, to attend the inheritance, naturally calls our attention to the cases in which a term may be used upon an ejectment. We have already seen that, in some cases, the possession of the *cestui que trust* may operate as a bar to his trustee (a). So where a purchaser is not, at the time of his contract, aware of the term, and its existence would endanger or affect his title, a fine levied, with five years nonclaim, will operate as a bar to the trustee of the term (b); although where the term is assigned in trust for the purchaser, a fine levied will not affect it, because such a construction would be manifestly contrary to the intention of the parties (c). But as the law on these

(a) *Supra*, p. 354.(b) *Iseham v. Morrice*, Cro. Car. 109, 5th resol.; 2 Ventr. 329.(c) *Freeman v. Barnes*, 1 Ventr.80; 1 Lev. 270. See *Smith v. Pierce*, Carth. 100; *Basket v. Peirce*, 1 Vern. 226.

points is not well settled, it may be laid down as a general rule, that nearly all terms for years, however ancient, and notwithstanding any adverse possession or fines, may be required by a purchaser to be assigned to attend the inheritance; and where a term has once been assigned to attend the inheritance, although at a period very remote, and it has been since treated as a subsisting term by declarations in the subsequent deeds, that the person in whom it is vested shall stand possessed of it in trust to attend the inheritance, a purchaser can never be advised to permit the term to continue outstanding, because it is clear, that it may be used against him upon an ejectment. Nor is it any answer to a purchaser's claim, that the term has already been recently assigned to attend the inheritance.

Where terms for years are raised by settlements, it is usual to introduce a proviso, that they shall cease when the trusts are at an end. In well-drawn deeds, this proviso always expresses three events: 1st, the trusts never arising; 2dly, their becoming unnecessary or incapable of taking effect; or, 3dly, the performance of them. But it frequently happens, in ill-penned instruments, that these events are not accurately expressed, or not all provided for; and in those cases it must be seen whether, in the events which have happened, the term has ceased, for if it has not, the purchaser must require an assignment of the term. To illustrate this doctrine, let us suppose a term for years to be created for raising a sum of money for the first son of *A*, who shall attain twenty-one, and that it is declared by the deed, that when the trusts are performed, the term shall cease. Now, in this case, if *A* should not have a son who attains twenty-one, the trusts would not have arisen, and consequently could not be performed; and it seems that the term will not cease; the

event which happened not being provided for in the declaration for cesser of the term.

In a late case (*d*), which has already been referred to, it appeared, that under a power Mr. Walsh Porter had, by deed, charged the estate in question with the payment of 5,000 *l.* to the children of his then intended marriage, at such time or times, and in such proportions, and in such manner as thereafter mentioned. And, by the same deed, in further exercise of his power, he appointed the estate to trustees for five hundred years, upon the usual trusts to raise the 5,000 *l.* payable to sons at twenty-one, and daughters at twenty-one, or marriage, with the usual provision for raising maintenance in the mean time. And it was provided, that if no child should become entitled to the portions, or if the person or persons to whom the next estate of inheritance of and in the said manor, &c. in reversion or remainder, expectant on the determination of the said term of five hundred years, shall, for the time being, belong, do, and shall, well and truly pay, or cause to be paid, unto the said Edmund Lambert and Thomas Gorman, (the trustees of the term) or the survivor of them, or the executors or administrators of such survivor, or well and sufficiently, to his and their good liking, secure to be paid the portion or portions hereinbefore provided, or intended to be provided, for such child or children, or so much thereof as shall be remaining unpaid (all such maintenance and interest as is hereinbefore mentioned being first raised and satisfied); and in case all and every of the trusts declared as aforesaid, of and concerning the said term, shall in all things be performed and satisfied, or shall be discharged, either by becoming incapable of being performed, or by any other means, and the trustees shall

(*d*) *Hays v. Bailey*, Rolls, 10th August 1813, *vide supra*, p. 319.

be paid their expenses, then the term should cease. The portions were paid to the personal representatives of the surviving trustee, with all interest and maintenance money up to the day of payment, by the reversioner, "in order," as it was declared, "to discharge the estates from the portions, and that the term might cease by virtue of the proviso contained in the deed of appointment;" and a regular release was executed by the trustees of the term upon receipt of the money. The estate was sold, and the purchase completed. The purchaser sold again; and it appeared, that one of the children was still under age; and, it was insisted, that the payment to the trustees did not discharge the estate from the portions. The seller filed a bill for a specific performance. It was argued, that the term in the event had ceased; but the Master of the Rolls, (Sir William Grant), suggested that, although the term might have ceased, yet the portions would still remain charged on the estate under the charge in the deed. It was, however, submitted, that the charge, and the term, and the trusts of it, must all be taken together. The portions would have been as much a charge on the estate under the trust of the term as they were under the express charge. If the term, which was the legal and substantial security, was gone at law, it was impossible for equity to say that the charge yet subsisted. The very intention of the parties would be frustrated by such a decision. The portions were to be paid, according to the charge, to the children in the manner after mentioned; and one mode afterwards mentioned was a payment to the children through the medium of the trustees. The proviso was inserted to meet the very case which happened. The trustees were persons in whom the party making the charge reposed confidence; and he, the creator of the trust, had expressly provided, that if the reversioner should be

desirous to discharge the estate *before the children were capable of receiving the portions* (for, if they were of age, the portions would, of course, be payable to themselves) he might pay the money to the trustees for them, or even secure it to the good liking of the trustees. Equity had no power to say, that this was not a discreet act; and that the portions, although paid to the trustees precisely as directed by the deed, should, for the great security of the infants, still remain charged on the estates. The term had unquestionably ceased at law; and the portions which it was raised to secure, had, of course, ceased with it. In support of the objection, it was argued, that the portions were not payable by the charge till the children attained twenty-one, and that they could not before that period be paid to the trustees, so as to discharge the estate from them. The Master of the Rolls said, that he was inclined to be of opinion, that the charge would run with the term which would regulate the mode of payment; but he doubted whether the term would cease, for it was required, that "all such maintenance and interest should be first raised and satisfied." Now maintenance was to be raised till the children attained twenty-one. Then how can it be said that that is done until the child attained twenty-one? That circumstance must concur; all the trusts must be performed; it is in the conjunctive. His Honor doubted therefore whether the charge would cease. Under these circumstances, he should think that the purchaser would not be forced to take the title; and therefore he overruled the exception to the Master's report against the title.

This objection was not considered in the argument. It might, had the point been made, have been insisted, that the direction in the deed, that "all such maintenance and interest being first raised and satisfied," must be confined

to maintenance and interest up to the time of payment of the principal. The interest was the fruit of the principal; and when the principal was paid, it would yield interest, and that would, of course, be the fund for maintenance. The ground taken against the title makes the reversioner still liable to pay interest under the charge in the deed, although he has paid off the principal, which will produce interest. Could he file a bill against the trustees to pay him the interest of the 5,000*l.* which he paid to them? Could the trustees file a bill against the owner of the estate for payment of the interest, although they had the 5,000 *l.* in the funds? And, if not, does it not follow that the interest was no longer a charge on the estate? The construction, which depends on the general expression in the deed, wholly defeats the intention of the parties, that the reversioner might, at any time, relieve the estate from the charge altogether, upon payment of the portions. The power supposed to be reserved to the owner is, to pay off the principal, and yet leave the estate subject to the interest. The decision, in this case, proves, that the charge of the interest is as serious an objection to the owner's title as the charge of the principal. If, therefore, the payment of the principal has any operation, it is to make the owner pay ten per-cent. interest instead of five. But, it is admitted, that the portions might be paid to the trustees before the children attained twenty-one. Now, as the maintenance and interest were to be *first* raised and paid, it must necessarily be intended, that the maintenance was such as had already accrued; for, how could the trustees raise by anticipation what might never become due? The proviso for cesser embraced, 1st, the event of there being no child who should become entitled to the portion; 2d, the payment of the portions to the trustees; 3d, the performance of the trusts. There are some

general words in the proviso which are unskilfully introduced ; but this was the intention, and the words are sufficient to effectuate it. The word, *and*, introducing the third event, must, it is submitted, be read *or* ; for the second and third events could not happen together. The case was afterwards heard upon appeal before the Lord Chancellor, but it had become unnecessary to decide the above point, and his Lordship gave no opinion upon it.

Where a portion is secured by a term of years, and the term is directed to cease upon payment of the money, and the estate is sold before the portion is paid, it sometimes happens that the purchaser is desirous to keep the term on foot, and the following plan has been adopted for that purpose.—A fictitious mortgage is first made of the term for raising the portion, to a friend of the purchaser's in which the purchase is not noticed ; then the estate is conveyed to the purchaser in the usual way, subject to the mortgage ; and then, by a subsequent deed, the supposed mortgagee declares that he has been paid off, and that he will stand possessed of the term in trust for the purchaser, and to attend the inheritance. Now, this plan, although certainly ingenious, is, I fear, ineffectual. It is impossible to read the deeds bearing date, as they necessarily must do, within a day or two of each other, without seeing that the whole proceeding is fictitious ; and if the term should be set up in ejectment, it would be quite open to the adverse party to insist that the deeds were nugatory. And when the fact is once established, that the portion was paid off without a *bond fide* mortgage, it should seem that the term must cease, by force of the proviso in the deed creating it, and that no artifice of the parties can keep it alive.

II. We may now consider shortly the leading rules on the doctrine of merger of terms of years, without a

knowledge of which the practical conveyancer must frequently be at a loss to know of what terms to require an assignment.

Where a term of years and the inheritance meet in one person in the same right, the term is extinct.

So a man cannot, Sir Edward Coke says, have a term for years in his own right, and a freehold in *auter droit*, to consist together (*e*); and he illustrates this rule by stating, that where a man, lessee for years, takes a feme lessor to wife, the term is extinct. But this position appears to be contradicted by the case of *Lichden v. Winsmore* (*f*), in which it was held, that if there be lessee for years, reversion for life to *A*, a married woman, and the lessee grant his estate to the husband, and then the wife dies, the term is not extinct, because the husband has the estates in several rights, for the freehold was in the wife, and the husband was merely seised in her right; or, to speak more correctly, the freehold was in the husband and wife, although in her right (*g*).

And it is clear, that if in a case like this, the coalition be not occasioned by the act of the termor, the term will not merge. Thus, the descent of the fee upon the wife of a termor for years after the intermarriage will not drown the term, because the estates do not coalesce by the act of the termor for years (*h*), and the term he holds in his own right, and the freehold in right of his wife. This was decided in the reign of James I. by Fleming, C. J. and Fenner and Croke, Justices, against the opinion of Williams, Justice, who, even after judgment was given, said to the counsel at the bar that, as clear as it was that

(*e*) 1 Inst. 338 b. See 9 East, 372.

(*g*) See *Polyblank v. Hawkins*, Dougl. 329.

(*f*) 2 Roll. Rep. 472; 1 Ro. Abr. 934, pl. 10; Ben. 141; and see *Thorn v. Newman*, 3 Swanst. 603.

(*h*) *Lady Platt v. Sleap*, Cro. Jac. 275; 1 Bulst. 118; Jenk. 2d Cent. pl. 38.

they were at the bar, so clear it was that the term was extinct; and in other respects expressed himself very violently, so that Sir Edward Coke's doctrine was not over-ruled without opposition.

Where, however, a husband termor for years, seised of the freehold in right of his wife, has issue by the wife, so that he is entitled, in his own right, as tenant by the curtesy, there seems reason to contend that the term will merge (*i*).

A term vested in a person as executor *may* belong to him beneficially; and it therefore seems, that if he purchase the reversion, the term will be extinct; although it is usual in practice to require an assignment of such a term on a future purchase of the inheritance; and this practice is sanctioned by an *obiter dictum* of Lord C. J. Holt's in *Cage v. Acton* (*k*), where he admitted (as a point perfectly clear) that if a man hath a term as executor, and purchases the reversion, this is no extinguishment. But in Brooke's Abridgment, it is in three several places (*l*) stated to have been held by the Judges Hales and Whorwood, in 4 Edw. VI. that if a man has a lease for years as executor, and afterwards purchases the land in fee, the lease is extinct; and this position is cited and not denied in several cases (*m*), and is adopted by Rolle in his Abridgment (*n*). So in a case in Leonard (*o*), Dyer explicitly laid down the same doctrine; and it has been treated as clear law, in two cases, one of which is reported by Hetly (*p*), and the other by Freeman (*q*). And in one case one of the Judges thought, that even the descent of

(*i*) See 1 Bulstr. 118.

(*k*) 1 Salk. 326; Com. 69; and see *Webb v. Russell*, 3 Term Rep. 393.

(*l*) Bro. Abr. Extinguishment, 54, Leases, 63, Surrender, 52.

(*m*) 3 Leo. 111; 2 Rolle's Rep. 472.

(*n*) 1 Ro. Abr. 934, pl. 9.

(*o*) 4 Leo. 37, pl. 102.

(*p*) Het. 36.

(*q*) 1 Freem. 289, pl. 338.

the fee on the executor would merge the term (*r*), although Lord Chief Baron Gilbert justly questions this position (*s*). The rule, that a purchase of the fee by the executor shall merge the term, appears to be founded in reason as well as upon authority; for, as far as his own interest is concerned, there cannot be any reason why the term should not merge. It is admitted, however, on all hands, that the term shall not be extinct as to creditors, and this I am induced to believe, from Lord Raymond's report of *Cage v. Acton*, is all that Lord Chief Justice Holt meant (*t*), although his *dictum* is so generally stated in Comyns's and Salkeld's reports of this case. At any rate, it was an *obiter dictum*, and cannot affect a doctrine apparently so well established; and it is therefore submitted to the reader, that in a case of this nature the term must merge in the inheritance, except as to creditors.

But a man may have a freehold in his own right, and a term in *auter droit* (*u*).

Therefore, if a man seised of the freehold intermarry with a woman termor for years, the term is not extinct, but the husband is possessed of the term in right of his wife, during the coverture, because he has not done any act to destroy the term, and it is cast upon him by the act of law (*x*).

So, if the lessee grant the term to the wife of the lessor, it will not merge (*y*).

But if a man possessed of a term in right of his wife, purchase the freehold, there seems ground to contend, that the term will merge, inasmuch as the estates coalesce by his own act, and not as in the case of marriage, by the

(*r*) See 3 Leo. 112.

(*s*) See Bac. Abr. Leases, (R.)

(*t*) 1 Lord Raym. 520.

(*u*) 1 Inst. 338 b.

(*x*) *Bracebridge v. Cook*, Plow.

Comm. 417; and see 4 Leo. 33;
Godb. 2; Het. 36.

(*y*) *Bracebridge v. Cook*, Plow.
Comm. 417.

act of law; and accordingly in one case (z), Dyer held the wife's term to be extinct by the husband purchasing the fee; and Manwood, C. B. agreed with him; and the same doctrine appears to have been held in a case reported by Moore (a). Lord C. J. Hobart, however, seems to have been of opinion, that a purchase by the husband of the fee should not extinguish the term (b), and in this opinion Lord C. J. Holt appears to have coincided (c).

Upon the foregoing principle, if the lessee make the freeholder his executor, the term will not merge (d).

It was formerly holden, that a term for years could not merge in a term for years; but in *Hughes v. Robotham* (e), it was determined, that if there be two termors, he who has the less estate may surrender to the other, and the term will merge in the greater: 2dly, that although the reversion be for a less number of years than the term in possession, yet the term in possession shall drown in that in reversion.

It remains to observe, that before the statute of uses (f), if a termor for years was enfeoffed to uses, equity would not compel him to execute the estate so as to deprive himself of his term. The statute of Henry, by transferring the use into a possession, would have destroyed the estates of termors who were enfeoffed to uses; but to prevent this injustice, an express saving was introduced into the act of the rights of all persons seised to uses. Therefore, if a fine or feoffment be levied or made to a lessee for years to the use of others, the term will not be extinct, although if the statute had not been made, the term would

(z) Godb. 2; 4 Leo. 38.

(a) Mo. 54, pl. 157.

(b) *Young v. Radford*, Hob. 3.

(c) See 1 Salk. 326.

(d) 1 Inst. 338 b; 1 Freem. 289, pl. 338. See Attorney-gene-

ral *v. Sands*, 3 Cha. Rep. 19.

(e) *Hughes v. Robotham*, Cro. Eliz. 302. See Bac. Abr. Leases, (S.) s. 2; *Stephens v. Brydges*, V. C. 1821, MS. accordingly.

(f) 27 Hen. VIII. c. 10, s. 3.

have been extinguished at common law (*g*). So, where a termor for years was made a tenant to the *præcipe*, it was held that although the freehold vested in him drowned the term until the recovery was suffered, yet, when the recovery was perfected, the term should revive (*h*). And it seems that the same rule must prevail where the conveyance is by lease and release, although it has been strenuously argued, that as the lease for a year is a surrender in law of the prior term, the subsequent release to uses shall not bring the case within the saving of the statute of uses. There appears, however, to be no weight in this argument; a lease and release being a common conveyance, and deemed one assurance; and from one report of the case, in which the question arose, it seems that the Judges (*i*) thought that the term was not extinguished by the lease for a year (*k*).

It may here be remarked, that a deed purporting to be an assignment of an old term may, if that term has by any accident ceased, operate as the creation of a new one. As in the common case of an assignment of a term in which the freeholder in reversion joins in granting, bargaining, selling, and assigning the term; if the old term has become void, it will be resuscitated by these words (*l*).

III. The expense of the assignment of any terms of years which a purchaser can require to be assigned to attend the inheritance, must be borne by the purchaser himself, but the title to them must of course be deduced

(*g*) Chesney's case, Mo. 196, 127; best reported Bac. Abr. pl. 345; 7 Rep. 19 b, 20 a, cited. Leases, (R.); S. C. by the name of

(*h*) Ferrers v. Fermor, 2 Roll. How v. Stiles, 3 Keb. 283, 309; Rep. 245; Cro. Jac. 643; Terrie's 2 Lev. 126.

case, 1 Ventr. 280, cited.

(*l*) See Denn v. Kemeys, 9 East,

(*i*) See 3 Keb. 310.

366.

(*k*) Fountain v. Cook, 1 Mod.

at the expense of the vendor; and if a term has never been assigned to attend the inheritance, the vendor must bear the expense, not only of deducing the title, but also of the assignment of the term to a trustee of the purchaser's nomination to attend the inheritance.

The rule, that terms of years which have never been assigned to attend the inheritance, must be assigned to a trustee of the purchaser's nomination, *at the vendor's expense*, is not acknowledged by some gentlemen of eminence, who, on the contrary, insist that the purchaser must consider the term either as a protection, or as an incumbrance. If he deem it a protection, then they contend that he must assign it at his own expense. If, on the contrary, the purchaser treat the term as an incumbrance, they admit that the vendor must discharge the estate from it, and accordingly offer to merge the term at his expense. The general practice of the Profession, however, is certainly in favour of the purchaser's right to require an assignment of the term to attend the inheritance at the vendor's expense; and when it is admitted that the vendor may be compelled to merge the term at his own expense, it seems very difficult to contend that the purchaser may not insist upon its being assigned. A refusal to *assign* may, under these circumstances, be thought to be a mere subterfuge to avoid the expense of the assignment, and throw it upon the purchaser. If the purchaser insist upon an assignment of the term, it seems clear that the vendor cannot safely merge it, although the purchaser refuse to bear the expense of the assignment. The title appearing on the abstract is that on which the purchaser is to act, and consequently the vendor, after delivery of the abstract, ought not merely of his own authority to do any act to alter or affect the title; and a trustee of a term can scarcely be advised, after notice of

a contract for sale of the estate, (when he is by construction of equity become a trustee for the purchaser), to merge the term against the consent of his *cestui que trust*, the purchaser. It would be difficult, therefore, to establish any other rule than that which, it is apprehended, is generally adopted by the Profession.

In some cases, perhaps, assignments of terms may be dispensed with.

In *Willoughby v. Willoughby* (*m*), Lord Hardwicke laid it down, "that where an old term had been assigned upon an express trust to attend upon and protect the inheritance, *as settled by such a deed*, or the uses of *such a settlement* described or referred to particularly, as it sometimes happens, and the conveyancer is satisfied that those uses of the inheritance have never been barred till his new settlement or purchase is made, he may very safely rely upon it, because the very assignment carries notice of the old uses (I). Nay, where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the cases of a purchase or mortgage, where the title deeds always are or ought to be taken in: for if he has the creation and the assignment of the term in his own hands, no use can be made of it against him. This, however, is never relied upon in practice. And a declaration of trust of a term never should be relied upon, unless all the title deeds are delivered to the purchaser. A mere declaration of trust will not protect the possession against a subsequent purchaser *bona fide*,

(*m*) 1 Term Rep. 763.

(I) *Qu.* this. If the person claiming under the settlement should sell the estate to two distinct purchasers, who were equally innocent, it seems that the second purchaser, by procuring an assignment of the term, might exclude the first purchaser during the term.

and without notice, who procures an assignment of the term; and it has even been held that the custody of the deeds, accompanied by a declaration of trust of the term, is, as against a bare declaration of trust, tantamount to an actual assignment(*n*). But, as we shall presently see, a case may perhaps occur, in which an assignment of a term would be a protection against a declaration of trust of it, accompanied by the deeds; so that a prudent purchaser will scarcely ever dispense with an actual assignment of an outstanding term.

Mr. Butler, in his learned and practical notes to Co. Litt. lays down the following rules respecting the cases in which a purchaser should or should not dispense with an assignment of outstanding terms(*o*).

“ 1st. It may be laid down as a general rule, that wherever a term has been raised for securing the payment of money, as the assignment of it by the trustee for the person entitled to receive, to a trustee for the person obliged to pay the money, is the best possible evidence of the payment of the money; it may be reasonably required as such.

“ 2dly. In case a term for years has been assigned to attend the inheritance, if, upon a purchase, *all* the deeds (as well originals as counterparts) by which the term was created or assigned are delivered to the purchaser, and he is satisfied that the trustee in whom it is there said to be vested has made no prior assignment of it, and that the vendor has not charged the estate with any intermediate incumbrance, it is difficult to say what possible use can be made of the term against him, or what good can be answered by requiring an assignment of it to a trustee of his own, unless it be to satisfy the requisitions of those

(*n*) Stanhope v. Earl Verney, Butler's n. (1) s. 13, to Co. Litt. 290 b.
 (*o*) See the 13th section of n. (1) to 1 Inst. 290 b.

to whom he may afterwards have occasion to mortgage or sell the estate.

“ 3dly. But if any of the deeds respecting the term are not delivered to the purchaser, or if he is not satisfied of the trustee not having previously assigned it, or of the vendor having made no intermediate incumbrance, it seems prudent to require an actual assignment of it to a trustee for him.”

With respect to the second of the above rules, the attention of the purchaser should be particularly called to the requisite, that the vendor has not charged the estate with any intermediate incumbrance. A vendor may, by fraudulent representations, induce a purchaser to believe that the title deeds are destroyed or mislaid: and if a purchaser acting under this impression should procure an actual assignment of a term from the person in whom it was vested, it seems impossible to contend that the person in possession of the deeds, although he claims a prior title to the inheritance (*p*), has any equity against the subsequent purchaser, who must not be prevented from making the best use he can of the term. It is evident, however, that the person having thus obtained an assignment of a term, must have considerable difficulty in using it as a sword to attack the possession of his adversary (*q*).

A purchaser may, in some cases, be entitled to the benefit of an outstanding term, although he has neither an assignment of it, nor the possession of the deeds relating to it. This doctrine will be discussed hereafter (*r*).

It may here be remarked, that where a term of years does not necessarily appear on the face of the conveyance,

(*p*) See 1 Pow. Mort. 4th edit. 510; *Evans v. Bicknell*, 6 Ves. jun. 174; *Martinez v. Cooper*, 2 Russ. 198.

(*q*) See *ex parte Knott*, 11 Ves. jun. 609.

(*r*) See *post.* ch. 17.

it should be assigned to attend the inheritance by a separate deed, and no notice should be taken of it in the conveyance of the fee, for the legal estate must prevail at law (*s*); and it is a consequence of this rule, that where a term of years is assigned by the conveyance of the inheritance, or even mentioned in it as a subsisting term, the owner cannot safely bring an ejectment in his own name only, lest his action should be defeated by the production of the conveyance to him, in which it would appear that the legal estate was vested in his trustee. And here we may correct the common error of excepting the term in the conveyance of the inheritance, as an incumbrance, although it is assigned to attend by a separate deed. This practice is very incorrect, for the term is a protection, and not an incumbrance; and the exception in the conveyance effectually defeats the advantages which might otherwise be derived from the term being assigned by a separate deed.

IV. Where trustees ought to convey to the beneficial owner, it will, upon a trial, be left to the jury to presume where such a presumption may reasonably be made, that they have conveyed accordingly, in order to prevent a just title from being defeated by a matter of form (*t*).

But where the trustee of a term is not joined in an ejectment brought by his *cestui que trust*, and the jury state in a special verdict, or a special case, that the term still con-

(*s*) See *Doe v. Wroot*, 5 East, 132; and the cases cited in the note to p. 138; which have overruled Mr. Justice Gundry's, Lord Mansfield's and Mr. Justice Buller's equitable doctrine as to terms of years. See *Doe v. Pegge*, 1 T. Rep. 758, n. (*a*), and several cases in Burr. Cowp. and Dougl.

(*t*) *Lade v. Holford*, Bull. Ni. Pri. 110, as explained in *Doe v. Sybourn*, 7 Term Rep. 2; and *Roe v. Reade*, 8 Term Rep. 118; and see *Doe v. Staple*, 2 Term Rep. 634; *Tankard v. Wade*, Irish Term Rep. 162; and *Hillary v. Waller*, 12 Ves. jun. 239.

tinues, the plaintiff cannot prevail at law, but will be defeated by the legal estate in his trustee (*u*). This must inevitably happen where a term of years has been assigned to attend the inheritance upon a purchase of the fee, and the purchaser brings an ejectment in his own name only. It were clearly too much to presume a surrender of a term which the owner has so anxiously kept distinct from the inheritance (*x*).

This was so stated in the last edition of this work; but the point has since undergone much discussion, and the leading heads of the argument, and the present state of the law on this head, must now be retraced (I).

It has long been the policy of our Legislature to encourage the free alienation of real property, and secure the titles of *bond fide* purchasers. Our statute book abounds with laws having this tendency. The same spirit pervades the common law. We are told that the maxims of the common law, which refer to descents, discontinuances, nonclaims and collateral warranties, are only the wise arts and intentions of the law to protect the possession and strengthen the rights of purchasers. A purchaser is a favourite of a court of equity. It is the settled law of that court, that if a man buy an estate fairly he may get in a term of years, or other incumbrance, although it is satisfied, and thereby defend his title at law against any mesne incumbrance of which he had not notice. It were idle to discuss, the policy of our law. In a commercial country like ours, where one great stimulus to enterprise in commerce is the hope to possess territorial ownership, every one is interested in the free interchange of property,

(*u*) *Goodtitle v. Jones*, 7 Term 2 Term Rep. 684.
Rep. 47; *Roe v. Reade*, 8 Term (x) See *Doe v. Scott*, 11 East,
Rep. 118; and see *Doe v. Staple*, 478.

(I) This was the statement in the 6th edition.

and the safety of purchasers. The danger of latent incumbrances renders it necessary that every possible guard should be thrown around purchasers. The policy of the law in this respect led to the received doctrine as to terms of years attendant on the inheritance. Abstractedly considered, nothing can be more absurd than that a purchaser of the fee should procure a term of years, created a century ago, to be assigned to a trustee for him. But with reference to the protection to be derived from such a term of years, it is of the deepest importance to a purchaser that he should keep it on foot. At law, every term of years in a trustee is *a term in gross*. This, which was distinctly laid down by Lord Hardwicke (y), should never be lost sight of. The moment that a court of law acts upon the term as a part of the inheritance, it strikes at the root of the settled doctrines of centuries, shakes the landmarks of the law of real property, and renders insecure the title of every purchaser in the kingdom. Our law permits the creation of terms of years for any period of time. Where a term, whether for one hundred or ten thousand years, is created by way of use, it invests the person to whom it is granted with a legal right to the estate during the period specified. It is not necessary by our law, that possession should accompany the legal estate in order that the title of the legal owner should continue unbarred. Possession by my tenant, or by a person with my permission, or acknowledging my title, is in law possession by me, and during such tenancy or holding my title remains unimpeached; therefore, although the legal owners of the fee of an estate have enjoyed it for the last one hundred years, yet that will not affect the existence of a term of years in the trustee to attend the inheritance, because the possession of the legal owner of the fee is

(y) 1 Term Rep. 765.

the possession of the termor ; their titles are consistent, and support each other. The owner of the fee is as a tenant at will to his own trustee. It frequently happens that the owner of the fee is indebted to the term of years for his peaceable possession ; such a possession, therefore, operates as a continual acknowledgment of the legal title of the termor, and proves its efficacy. The term is anxiously assigned to attend the inheritance ; it does accordingly attend the inheritance ; and the performance of the very service for which it was created never can be a ground for defeating its legal operation. Upon principle, therefore, a term of years assigned to attend the inheritance ought not to be presumed to be surrendered unless there has been an enjoyment *inconsistent with the existence of the term, or some act done in order to disavow the tenure under the termor, and to bar it as a continuing interest*. This has always been the received opinion of the Profession, and particularly of that class of the Profession to whom titles are more particularly referred. It matters very little what is the opinion of any individual conveyancer ; but the opinion of the conveyancers, as a class, is of the deepest importance to every individual of property in the state. Their settled rule of practice has accordingly, in several instances, been adopted as the law of the land, not out of respect for them, but out of tenderness to the numerous purchasers who have bought estates under their advice.

As judgments, and other incumbrances, are infinite, and it is impossible to rely even upon searches for them, the doctrine, that a term of years attendant on the inheritance should protect a purchaser against incumbrances of which he had not notice, was long since established. This rule of property was shaken in the time of Lord Mansfield, when the courts of law broke down the boun-

dary between them and courts of equity ; but the barrier has since been restored, and equitable doctrines are no longer acted upon in courts of law.

Now, with a view to discuss at large the doctrine of presuming a surrender of a term assigned to attend the inheritance, let us suppose a term of years to be created in the year 1700, by way of mortgage. *B* buys the fee in 1760, and pays off the mortgage, and the term is assigned to a trustee for *B*, his heirs and assigns, and to attend the inheritance. *B* lives till 1819, without disturbing the term, or in any manner recognizing its existence. Can it be contended that a surrender of the term should be presumed? Was not *B*'s possession consistent with the existence of the term immediately after the assignment in 1760? If so, when did it become adverse to it? What necessity was there for any act recognizing the existence of the term whilst *B*'s continued possession was consistent with the term, and was supported by the trust upon which it was assigned? If the term ought to have been recognized from time to time, how often should this act be repeated; once a week, or once a month? Is there any ground upon which, in 1819, a surrender can be presumed on the strength of *B*'s possession, which would not be equally operative the first week, nay, the first day after the purchase in 1760? In the absence of evidence of a surrender, it is impossible, on any sound principle, to presume one; unless the precise instant can be pointed out when the owner of the inheritance was desirous no longer to have the benefit of the term. Without his presumed concurrence a surrender cannot be presumed; for the trust was not to surrender the term, by which means incumbrances might be let in, but expressly to keep it on foot, in order to exclude them. A surrender by the trustee, therefore, without the direction of his *cestui que trust*,

would be a breach of trust. It is said that the expense of making out a representation to a termor makes the term a burden instead of a benefit to the owner of the fee. It is not, however, denied that the owner of the fee may keep on foot a term attendant on the inheritance, and that no court of law can control his power to do so. Where he has exercised his power, and declared, without any limitation of time, that the term shall be attendant on the *inheritance*, and be in trust for him, his *heirs and assigns*, does not this mean that the inheritance shall be so attended during all the years to come in the term?—and if it do, what power has a court of law, out of a morbid compassion for him, on account of the expense which it may occasion, to presume a surrender of the term which he has so anxiously kept on foot? particularly as at the very moment that a surrender of the term is presumed, its existence may be required to protect the estate against a latent incumbrance; and the Court has no means whatever to ascertain whether there is any such incumbrance. The amount of the expense, too, must depend upon the particular circumstances of each case: and yet it would hardly be desirable that the rule should depend on the quantum of expense which an assignment would occasion. If, however, expense is to be adverted to, on that ground alone surrenders should not in such a case be presumed; because that doctrine would weaken a purchaser's reliance on any given term of years; he would in almost every case search for judgments. This could not be done without expense; and where a man has been in the habit of confessing judgments, it very seldom happens that satisfaction is entered upon them when they are paid off. This leads to great expense, and difficulty in practice; because a purchaser expects the judgments to be regularly discharged; and where even a few years have elapsed

since the payment of the debt, if the creditor is living and can be traced, yet he hesitates to do any further act in relation to a transaction which he considered long since closed.

If the surrender of the term cannot be presumed at *B*'s death in 1819, we will suppose the estate to descend to *B*'s heir at law. Now no man ever heard of an heir at law executing a deed for the sole purpose of recognizing terms of years attendant on the inheritance, or taking assignments of them to new trustees to attend, where they had already been assigned to trustees of his ancestor's nomination for that purpose. His possession, however, comes in the place of his ancestor's ; and why should he be deprived of the guard which his ancestor created for his benefit ? If his ancestor's possession was the possession of the trustee, it will not be denied that his possession stands in the same relation. The trust is to attend the *inheritance*, and for *B*, his *heirs* and assigns ; therefore, under the express words of the trust, the heir is entitled to the benefit of it, and his possession is the possession of the trustee.

Suppose further, that *B*'s heir, in 1820, makes a marriage settlement without noticing the term of years, could the term on that account be presumed to be surrendered ? It is *not* the practice upon a marriage settlement to re-assign attendant terms to new trustees ; and no prudent practitioner declares the trust of attendant terms by the settlement, lest the parties upon an ejectment should be defeated by the production of their own conveyance, upon the face of which it would appear that the legal estate was outstanding ; and I never saw or heard of a separate declaration to that effect on a marriage. In short, it is not the practice to advert to terms of years on a marriage settlement, or on a devolution from ancestor to heir,

although, no doubt, that may have been done, and with propriety, in some particular cases. It is very rare indeed, that upon a marriage the title is investigated. In ninety-nine cases out of a hundred, the parties take up the title with the settlement, conveyance, or will, under which the husband or wife immediately claims. This is a fact. In very few instances, and those are upon the marriages of persons of consequence, is the title investigated; and it has never been the custom to take a new assignment, or make a declaration of trust of a term before assigned to attend the inheritance. At the time of the settlement, a fraud by the husband is not contemplated. No purchaser or mortgagee would accept the title without inquiring for a settlement; and as the wife would, in most cases, be entitled to dower if there was no settlement, her concurrence in a fine would be required, and that would at once lead to a discovery of the settlement. Neither is it usual to deliver to the trustees of a marriage settlement the deeds relating to the term. The tenant for life, it is settled, is entitled to the custody of the deeds. The trustees have merely the custody of one part of the settlement.

If *B*'s heir was entitled to the benefit of the term in 1820, when he made the settlement, can the execution of the settlement deprive him of its aid? Is the act inconsistent with the existence of the term? Was it not declared to attend the *inheritance*, and to be in trust for *B*, his *heirs and assigns*? Suppose the heir, as is usual, to take a life-estate under the settlement, and to be in of the old use, can it be contended that this portion of the old use is inconsistent with the title of the trustee, although the latter was consistent with the use in fee in the heir? Why should an act be done to recognize the term? The assignment of the term to attend the *inherit-*

ance speaks at all times, whilst the possession is consistent with the title of the trustee of the term. The universal practice, not to require assignments of attendant terms on descents or settlements, proves unequivocally the opinion of the Profession that the possession of the heir, and of the persons claiming under the settlement, is in law the possession of the trustee of the term. Length of time in this case is unimportant. If we alter the above dates, and state *B*'s purchase to be in 1800, his death in 1805; and the settlement in 1810, the principle is precisely the same; and it would startle most men to hear, that because the term had not been recognized since its assignment in 1810 a surrender of it may be presumed.

If, however, the term is a subsisting interest after the settlement, let us suppose the life-estate of *B*'s heir under the settlement to be sold immediately afterwards, without the purchaser taking an assignment of the term; does this let in the presumption of the surrender of the term? Now the term, it must be repeated, was assigned to attend the *inheritance*, and in trust for *B*, his *heirs and assigns*. If the possession of the heir and his family under the settlement was not adverse to the title of the termor, how could the title of the purchaser be so? The term is a benefit, originally assigned as such, and not an incumbrance. A man should at least reject a benefit, or act inconsistently with the intention of the person bestowing it, before he is presumed to repudiate it. The event, if the event is to be looked at upon which this question hinges, shows that he required the protection of the term more than any of the former owners; and if *his* acts are to be adverted to, we shall find him anxiously obtaining a further assignment of the term. For let us further suppose that *B*'s heir, before his settlement, confessed a judgment which was not satisfied, and that the purchaser bought without

notice of it, and when he did discover it, procured an assignment of the term to a new trustee, and set up the term as a defence against an execution upon the judgment: *Unless the presumption of the surrender is an inevitable conclusion from the fact of the purchase*, it must be admitted that there is no ground to presume a surrender. But can it possibly be laid down as a rule, that every attendant term must be presumed to be surrendered against a purchaser who does not take an assignment of the term, or a declaration of the trust of it at the time he purchased? Why should he do so whilst his possession is consistent with the title of the termor, and expressly within the limits of the original trust? Would not an assignment, a week, or a month, or a year afterwards, before any adverse claimant appeared, be sufficient to keep the term on foot? If so, when, at what precise moment, does the presumption arise?

Where an easement, for example, is enjoyed, or having been enjoyed is discontinued to be used, the user or non-user forcibly lets in the presumption of a grant in the one case, and a surrender in the other. But there the act speaks for itself. The whole argument in our case is, *that there is a continued enjoyment under the original trusts, which embrace all the persons who have successively enjoyed the estate*. Therefore, as an enjoyment of the easement would of itself, without any further assertion of right or declaration, exclude the presumption of a surrender, so here the continued enjoyment must have the same operation.

Does then the appearance of the adverse claimant weaken the purchaser's case? So far from it, that in the great majority of the cases in the books the protection was not sought for until the necessity for it appeared. Equity does not regard notice at the time of getting in the term. The notice, to operate, must be fixed upon the party, at

the time of the completion of the purchase. Equity too will assist a purchaser where he has not got an assignment of the term, but has the better title to it. At law, the term is a term in gross, and the courts of law ought not to enter into a consideration of the equities of the parties; because they have not the necessary machinery to enable them to come to a due conclusion on the equitable rights. It has been decided in equity, that if a mortgagor, after a defective mortgage in fee, confess judgment, the judgment-creditor, although he has the legal title, shall be postponed to the mortgagee (z). So it has been held (a) that a prior mortgagee, having a subsequent judgment, may tack the judgment to the mortgage; but a prior judgment-creditor getting a subsequent mortgage cannot do so, *because the judgment is not a specific lien upon those lands*, that is, he does not go on the security; he has not trusted to the credit of the estate. A judgment-creditor therefore does not, in equity, stand on the same footing with a purchaser of the estate itself. In a case (b) where there was, 1st, an act of bankruptcy by A; 2dly, a settlement for valuable consideration by him, without notice to the parties of the act of bankruptcy; and 3dly, a commission against him; although the commission over-reached the settlement, yet the persons claiming under it were held to be entitled to the benefit of an outstanding term created prior to the bankruptcy.

These cases show the rules of equity which flow from the anxiety of the Court to strengthen the title and protect the possession of purchasers; but if at law the outstanding term is to be presumed to be surrendered, they will no longer afford any protection to purchasers.

(z) *Burgh v. Francis*, 1 P. Wms. 279, cited.

(a) *Anon.* 2 Ves. 663; *Brace v. Duch. of Marlborough*, 2 P. Wms. 491.

(b) *Wilker v. Bodington*, 2 Vern. 599.

Some stress, in favour of the presumption, has been laid on two circumstances ; the one, that the estate has been quietly enjoyed ; the other, that the deeds relating to the term are in the hands of the owner of the estate. The first circumstance, I have already endeavoured to prove, is against the presumption of a surrender. The latter can never operate in favour of the presumption, unless the courts of law deny the power of a man to keep an attendant term in a trustee and the deeds in his own possession. In no case does the trustee of the term keep the deeds. They form part of the muniments of title, and are kept as such by the owner of the fee. If it be necessary upon a sale to covenant for their production, by whom but the owner should the covenant be entered into ? and the covenant should of course be entered into by the person holding the deeds. The trustee of the term, even if the deeds were deposited with him, could not be compelled, and would not be advised, to covenant for the production of them. Besides, the case of *Doe v. Scott*, which will be referred to presently, fully answers that objection. That the judgment-creditor has not the possession of the deeds, and therefore the surrender, if there be one, is not likely to be in his hands, cannot surely be a ground to presume that there actually is such a surrender. If the judgment-creditor has the better equity, which is the true inquiry in these cases, he may file a bill against the purchaser, who would be compelled to answer, whether there was a surrender or not.

Suppose that the assignment, when it is taken, is made not by the original trustee, who is dead, but by his son, who has regularly taken out administration to him, does that weaken the case ? Certainly the administrator could not know that his father had not surrendered the term in his life-time ; but he was more likely to know the fact than

any other person. For the family solicitor would of course peruse the deed on his behalf; and if a surrender had been made of the term, which probably would have passed through his office, he would not have suffered the son, as administrator, to execute an assignment of it. Besides, if some deed is, in the absence of all evidence of its actual execution, to be presumed, why should not a new assignment to attend be presumed, if that were necessary to support the purchaser's title, rather than a surrender, which would operate to defeat it? For his possession was consistent with the term, and he trusted his money on the security of the estate itself, which the judgment-creditor did not.

Fifteen years ago, it was very much the practice to leave terms already assigned to attend the inheritance, in the original trustees, and to be satisfied with a general declaration of trust of all attendant terms. It never occurred to the highly respectable persons by whom that practice was adopted, that a surrender of the terms could be presumed. It were difficult to contend that a mere general declaration is sufficient to keep the term alive, if without it the presumption of its surrender would be let in. The trustee of the term, by force of the original trust, becomes, without any further declaration, a trustee for the purchaser. Now if the trust be a trust for the purchaser, and the latter do no act amounting to a disclaimer of the benefit of the trust, how can it vary his rights, that he neglected to re-declare that which has already been expressly declared, viz. that the trustee should hold the term for the original owner, his heirs and assigns, and to attend the inheritance?

Lord Hardwicke, in *Willoughby v. Willoughby*, enters very fully into this doctrine. He admitted, that where an old term has been assigned upon an express trust to

attend the inheritance as settled by such a deed, and the conveyancer is satisfied that the uses of the inheritance have never been barred till the new purchase or settlement is made, he may very safely rely upon it, because the very assignment carries notice of the old uses. Nay, where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may entirely rely upon it, especially in the case of a purchase, where the title deeds always are or ought to be taken in; for if he has the creation and the assignment of the term in his own hands, no use can be made of it against him (c). Lord Hardwicke thus states cases in which terms may be safely left in the original trustee; but it never occurred to him that the circumstance of so leaving them would let in the presumption that they were surrendered.

It is said that this doctrine withdraws a large portion of the real property in the kingdom from the jurisdiction of the courts of common law. That, however, is not so; because the title of the termor is the legal one, and therefore those courts, in such cases, decide upon the legal title, which only is within their province. The term is set up, not in bar of the jurisdiction over the property, but in consequence of the rule of the court itself, which forbids an equitable tenant to recover against the legal title. If even the doctrine had the supposed operation, that would depend upon the law of the land, and if it required alteration should be altered by the Legislature. But the courts of law have been so anxious to support attendant terms, that it has been settled ever since the reign of Charles II. that such a term shall not be barred, even by a fine levied by the owner of the fee, against the intention of the conusor; because such an owner

(c) 1 Term Rep. 772.

of the inheritance must be taken as tenant at will to his trustee, and then his possession is the possession of the trustee (*d*).

Mr. Justice Buller observed, in *Doe v. Pegge* (*e*), that so long ago as the time of Justice Gundry, when an outstanding satisfied term was offered as a bar to the plaintiff's recovery, that Judge refused to admit it, saying that there was no use in taking an outstanding term but for the sake of the conveyancer's pocket; since which time, Mr. Justice Buller added, it has been the uniform practice, that if the plaintiff be entitled to the beneficial interest, he shall recover possession. It does not appear in what case Mr. Justice Gundry made this sweeping observation. It is, however, not law at this day, and indeed never was to the extent in which it was laid down; and Mr. Justice Buller lived to see the law on this subject restored, and his own opinions over-ruled (*f*). In the same case of *Doe and Pegge*, Lord Mansfield observed, *that trusts are a mode of conveyance peculiar to this country*. In all other countries the person entitled has the right and possession to himself; but in England estates are vested in trustees, on whose death it becomes difficult to find out their representatives, and the owner cannot get a complete title. If it were necessary to take assignments of satisfied terms, terrible inconveniences would ensue, from the representatives of the trustees not being to be found. Sir Edward Northey's clerk was trustee of near half of the great estates in the kingdom. On his death it was not known who was his heir or relative. So that, where a trust-term is a mere matter of form, and the deeds mere muniments of another's estate, it shall not be set up against the real owner. It must excite surprise, that

(*d*) 1 Ventr. 82; 2 Ventr. 329;
1 Sid. 460.

(*f*) See *Doe v. Staple*, 2 Term
Rep. 684.

(*e*) 1 Term Rep. 760, n.

Lord Mansfield should have imagined that any rule, whose tendency it was to subvert what was peculiar to this country, could long subsist while the peculiarity itself was allowed to exist. As well might you admit the rule which excludes the half blood, and yet, in the face of contrary evidence, presume that a brother of the half blood proceeded from the same couple of ancestors as the person last seised. Is the whole system of trusts to be subverted because sometimes an obscure trustee dies without relations? Or is the legal estate to subsist, or not, according to the expense which a re-conveyance may occasion in any given case? This doctrine never could stand the test of an accurate investigation, and has long since been overruled. They who have best understood the doctrines of equity, have powerfully deprecated their adoption by courts of law.

In *Goodtitle v. Morgan* (g), a mortgage for nine hundred and ninety-nine years was made in 1761, by Jones, the owner of the fee. In 1767, Jones made a mortgage in fee to Morgan; and in July 1769 he made a mortgage in fee to another person. In 1768, the nine hundred and ninety-nine years term was assigned to a trustee for Jones, and to attend the inheritance. The first mortgage in fee was before that assignment, and the last after it. In December 1769, he made a mortgage in fee to Sprigg, and the term of nine hundred and ninety-nine years was assigned to a trustee for Sprigg, and he was allowed to recover in ejectment, on the demise of his trustee, against the two prior mortgagees in fee; although it was speciously argued, that if, previous to the conveyance in 1769 to Sprigg, the defendants had brought ejectments upon their mortgages, neither Jones nor his trustee could have set up this term as a bar to their ejectment; and that, if

(g) 1 Term Rep. 755.

Jones himself could not set up the term, it seems to be absurd to say that those who claim under him can, for they cannot claim a greater estate than he had. But this argument did not prevail, although Mr. Justice Buller did not put the decision on the right grounds. The case is an authority for my position. It decides clearly that a surrender of the term cannot be presumed on the ground that the first mortgagee did not take an assignment or a declaration of trust of it. A second mortgagee, therefore, procuring an assignment of the term, must prevail at law, and also in equity, unless he had notice at the time he advanced his money of the first mortgage.

In *Doe v. Staple* (*h*), Lord Kenyon, C. J. said, that he extremely approved of what was said by Lord Mansfield in the case of *Lade v. Holford*, that he would not suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but would direct a jury to presume a surrender. He added, "I much approve of that; and where a surrender is presumed, there is an end of the legal title created by the term."

In *Doe v. Sybourn* (*i*), the same learned Judge said, that in all cases *where trustees ought to convey to the beneficial owner*, he would leave it to the jury to presume *where such a presumption might reasonably be made*; that they had conveyed accordingly, *in order to prevent a just title from being defeated by a mere matter of form* (*k*).

Now these rules, it will be observed, are not in favour of presuming a surrender of a term expressly assigned to attend the inheritance against a purchaser. The doctrine that a mortgagor shall not set up an attendant term against

(*h*) 2 Term Rep. 696.

(*i*) 7 Term Rep. 2.

(*k*) And see *Goodtitle v. Jones*,

7 Term Rep. 47; *Roe v. Reade*,

8 Term Rep. 118.

a mortgagee does not warrant the presumption of a surrender in this case. In the former case, there are only the rights of the mortgagor and mortgagee still in question, and the presumption is made in favour of the mortgagee. The claim of a third person does not intervene. But does it follow that a surrender should be presumed, not as between the mortgagor and mortgagee, but as between two innocent mortgagees, both claiming under the same mortgagor, where one, after the execution of both of the mortgages, has obtained an assignment of the term? Why is he to be deprived of the benefit of his diligence? Why is this plank in the shipwreck to be taken from him? The doctrine can with much less propriety be applied where the person who has obtained an assignment of the term is an actual purchaser of the estate, whilst the person whom he seeks to exclude by the term is a mere judgment-creditor, having only a general lien over all the seller's property, and who perhaps suffered the judgment to remain dormant many years. The objection is not, that a surrender cannot be presumed against *an owner of the inheritance*, but that the presumption ought not to be made against a *purchaser* of the inheritance, where the contest is between him and incumbrancers claiming under the *seller*, but of whose claims he had not notice. Even the case of *Goodtitle v. Morgan*, in the decision of which Mr. Justice Buller concurred, proves that the mere circumstance of executing mortgages without assigning the term, does not let in the presumption of a surrender against a subsequent mortgagee who takes an assignment of the term. Upon principle, it seems impossible to contend that the circumstance of the last mortgagee not procuring the assignment at the very moment he advances the money can let in the presumption of a surrender.

The rule, that where trustees ought to convey to the beneficial owner a jury may presume such a conveyance, in order to prevent a just title from being defeated by a mere matter of form, is not denied to be a wise one ; but it does not apply to the case under discussion ; for in this case the trustees ought *not* to surrender the term ; to do so would be to commit a breach of trust ; and the presumption, if it is made, has not the merit of preventing a just title from being defeated by a mere matter of form, but lets in one title to the destruction of another, *where the equities are at least equal* ; for if the subsequent purchaser has not *equal equity* with the prior incumbrancer, equity itself will deprive him of the protection of the legal term, although beyond dispute an existing one.

The case of *Keene v. Deardon* (l), proves, that possession, where it is consistent with the title of a trustee, cannot be deemed adverse to it ; and that no presumption of a surrender can be made contrary to an express trust. This proves both the propositions in the case under discussion. Possession is certainly evidence of title, but it is not evidence of the quality of the title. It does not prove whether you are seised in fee, or have a mere chattel interest ; nor does it prove whether your title is legal or equitable. And therefore possession may always be shown to be consistent with the title of a trustee of an attendant term. After an express trust to attend the inheritance, a surrender of the term should never be presumed where the rights of the *cestui que trust* are not invaded by the trustee, and the *cestui que trust* has done no act to disavow his right to the trust of the term.

The case of *Doe v. Scott* (m), is a strong authority against the doctrine of presumption. In 1727, Lord Oxford executed a mortgage for a term of one thousand

(l) 8 East, 218.

(m) 11 East, 478.

years. In 1751, Lord Oxford executed a marriage settlement, wherein it was stated, that 27,000 *l.*, part of the lady's fortune, was to be applied to the discharge of the mortgage. Since that time no mention was made of it, nor was there any other evidence of its existence, till, in a mortgage-deed of the 3d of December 1802, this term, together with another outstanding term of 1709, was assigned to secure the mortgage-money. It was insisted that a surrender of the term ought to be presumed, on two grounds: 1st, the recital in the deed of 1751, that there was an adequate sum to be applied in discharge of the mortgage, and no evidence of the term having been acted upon or recognized from that period until 1802, when it was assigned as an outstanding term; and, 2dly, the possession of the deed itself by Lord Oxford, the owner of the inheritance, which could not have happened unless the mortgage had been paid off. The learned Judge who tried the cause held, that although no notice had been taken of the term from 1751 till 1802, yet the owner of the inheritance having then joined with the representatives of the termors in executing a deed, in which it was recited that the term had not been surrendered, he thought that a surrender could not be presumed. The Court of King's Bench were of the same opinion. Lord Ellenborough, C. J. said, that there was no purpose of justice to be answered by presuming a surrender in this case; nor was it for the interest of the owner of the inheritance to have it assigned to a trustee to attend the inheritance.

Now this case went much farther than it is necessary to push the doctrine in the case under discussion. In 1751, a sum was appropriated to discharge the incumbrance; and as the deeds were in Lord Oxford's possession, the mortgage must have been paid off. The term

had not been assigned to attend the inheritance, and, therefore, for fifty-one years, the period between 1751 and 1802, the term was *an incumbrance*, and not a benefit; and yet the assignment of 1802 was held to be evidence against a surrender. Why was it stronger evidence than the assignment of the term in trust for the purchaser in our case? There, too, the term had been assigned to attend the inheritance, and therefore the possession was consistent with the express trust of the term; whereas in Lord Oxford's case the freeholder's possession was only consistent with the legal title in the mortgagee, under the *equitable* rule, that the mortgagee, when paid off, became a trustee for the owner of the inheritance. It is said, however, that there it was for the benefit of the owner that the term should be kept on foot. What circumstance in the supposed case required that the term should be presumed to be surrendered? Was not the purchaser the owner of the estate? And was it not for his benefit that the term should be deemed a subsisting interest?

Lord Eldon's opinion does not accord with the doctrine of presuming surrenders of attendant terms. In *Evans v. Bicknell* (*n*), which was decided in 1801, that learned Judge observed, that it seemed to him rather surprising, if he might presume to say so, that Lord Mansfield, who concurred with Mr. Justice Buller in a great many of these equitable principles in a court of law, should not have attended to these distinctions, which perhaps will be found in the very principles upon which the Court of Chancery exists. Titles to property may possibly be found to be very considerably shaken by the doctrine of the Court of King's Bench as to satisfied terms. The law as to that here is, that a second mortgagee having no notice of the first mortgage, if he can get in a satisfied term,

(*n*) 6 Ves. jun. 184.

would do that which is the true ground of the decision, though it is not put upon that by Mr. Justice Buller; he would, as in conscience he might, get the legal estate, and by virtue of that protect his estate against the first mortgagee, having got a prior title, the conscience being equal between the parties. When once it is said at law that a satisfied term should not be set up in ejectment, the whole security of that title is destroyed; and therefore, even with the modern correction that doctrine has received in the late cases, which is, that you may set up the term, though satisfied, and put it as a question to the jury, whether an assignment is to be presumed, it seemed to his Lordship very dangerous between purchasers; and the leaning of the Court ought to be that it was not assigned: and he fully concurred with Lord Kenyon, *that it is not fit for a Judge to tell a jury they are to presume a term assigned because it is satisfied; but there ought to be some dealing upon it*, or you take from a purchaser the effects of his diligence in having got in the legal estate, to the benefit of which he is entitled. Then suppose the law takes upon itself to decide the question between purchasers upon this subject, can it decide upon the same rules as courts of equity, as upon the question of notice? It will be said upon this doctrine a court of equity does inquire into this; and it is a rule of property in equity, and therefore ought to be a rule of property at law. But how has it become a rule of property in equity? In equity, the first mortgagee may ask the second whether he had notice. If that defendant positively denies notice, and one witness only is produced, to the fact of notice, if the denial is as positive as the assertion, and there is nothing more in the case, a court of equity will not take the benefit of the term from the second mortgagee, placing as much reliance on the conscience of the defendant as

on the testimony of a single witness, without some circumstances attaching a superior degree of credit to the latter. It is impossible, therefore, that the rule of property can be said to be the same as at law; and if it stands upon different principles, in fact, it is perfectly different.

In *Maundrell v. Maundrell* (*o*), which was decided in 1804, the question arose, whether a purchaser could protect himself against dower by a prior term of years, unless it was actually assigned to a trustee for him; and the Lord Chancellor ultimately decided that he could not; because such had been considered the general rule; but his Lordship, upon principle, thought that the purchaser would, as in other cases, be entitled to the benefit of the term without an actual assignment. He said that he doubted whether it was possible upon principle, to say the assignment of a term that has been once assigned to attend the inheritance, is necessary from time to time whenever that inheritance is made the subject of purchase (*p*).

The opinion of Lord Eldon therefore is that an assignment of the term is not necessary upon every new purchase; and this is a powerful authority against the presumption of a surrender, on the mere ground that the term has been left undisturbed. *Maundrell v. Maundrell* is not an authority requiring an assignment in every case upon every new purchase; but whilst it establishes the necessity of an actual assignment, in order to bar dower, is a grave authority for the continued existence of the term in other cases, although it is left in the name of the original trustee.

In the late case of *Doe on the demise of Burdett v. Wright*, B. R. T. T. 1819, a term assigned in 1735, to raise an annuity, and subject thereto to attend the inhe-

(*o*) 10 Ves. jun. 246.

(*p*) 10 Ves. jun. 259; and see p. 260.

ritance, was presumed to be surrendered. No act had been done to acknowledge the term, except that, upon a sale in 1801 of a small part of the estate, for redeeming the land-tax, the owner had covenanted to produce to the purchaser the deeds creating and assigning the term. There, however, the ejectment was by a person claiming as heir, against a person who claimed also as heir (*q*).

But in the cases of *Doe v. Hilder*, and *Doe v. Stace*, B. R. (*r*), (I), which were decided afterwards in the same term, it appeared that the ejectment was brought by a judgment-creditor, who had issued an *elegit* against Richard Newman. In 1762 a regular mortgage-term of one thousand years was created by Francis Hare Naylor, the owner of the fee, and several other charges were made previously to and in the year 1770. In 1771, Naylor devised the estate to trustees, to sell. In 1779,

(*q*) MS.; S. C. 2 Barn. & Ald.
710.

(*r*) MS.; S. C. 2 Barn. & Ald.
782.

(I) Another question of great importance arose in these causes, which it became unnecessary to decide, viz. whether the statute of frauds enabled a judgment-creditor, under an *elegit*, to take the term in execution. The statute, it is decided, did not intend to place the right of the creditor on the same footing against an equitable as against a legal estate; and it does not enable him to take in execution an equity of redemption, or a trust in a leasehold. Now every attendant term is at law a chattel real—a term in gross, and therefore cannot be taken in execution for the debt of the *cestui que trust*. The Legislature never intended to reduce a fee-simple estate with an attendant term to a level with a chattel interest, and to give the right of execution as if it were a chattel interest, where, under the same circumstances, a mere chattel interest would not be within the statute. The act in all its provisions is inaccurately framed, and it is not desirable that another new construction should at this day be given to it. A term outstanding has always been considered to protect against judgments; but if the construction above alluded to were to prevail, it would be necessary to search for judgments in every case, in order to ascertain whether any writ of execution had issued, or rather the term would be no protection, because it could not be discovered whether a writ had issued.

they sold, and conveyed to John Newman in fee, and the one thousand years term was, in consideration of the payment of the mortgage-money, assigned by a separate deed (7th October, 1779) to a Mr. Denman, his executors, administrators and assigns, “in trust for the said John Newman, *his heirs and assigns*, and to be assigned, conveyed, and disposed of, as he or they should direct and appoint. *And in the mean time, and until such appointment* to attend and wait upon *the freehold and inheritance of the same premises*,” to protect the same against mesne incumbrances. In October 1790, John Newman died intestate, leaving Richard his brother and heir. In November 1797, Richard died, leaving Richard, his son, his heir, then a minor. On 23d August 1808, the last-named Richard gave a warrant of attorney to the lessor of the plaintiff to enter up judgment for 4,000 £, which was immediately done. In 1810, Mr. Denman, the trustee of the term, died intestate, leaving John Denman, his son and next of kin. In October 1814, Richard Newman, on his marriage, settled the estate to the use of himself for life, with remainder over in strict settlement. In June 1816, he sold and conveyed his life-estate to his mother, and she devised the estate to the persons under whom the defendant claimed as tenant. In 1817, the lessor of the plaintiff issued an elegit, without having revived the judgment, and had an inquisition taken thereon, which was set aside for irregularity. In 1818, he revived the judgment by *scire facias*, and issued an elegit; and on 13th March 1818 an inquisition was taken thereon, and then the ejectment was brought. On 17th March 1819 (after the commencement of the ejectment), John Denman, as the son and next of kin of Mr. Denman, took out letters of administration to him, and by a deed, dated the 19th of the same month, he, by the direction of the

devisees of the purchaser, in the usual and regular way, assigned the term to John Newman, a trustee for them, and to attend the inheritance. *The deed creating the term was produced by the purchaser of the largest part in value of the estate comprised in it. The deed assigning the term to attend on the purchase by Mr. Newman, in 1779, and the last deed of assignment, were produced by the defendants.* The learned Judge thought that the question as to a surrender ought to go to a jury. His Lordship told them, that it seemed to him that as a trustee was appointed forty years ago, and had never done any act, but that the party who was beneficially interested had always acted on the property, he (the learned Judge) could not consider an administration taken out but a week before the assignment as at all effective; that he considered to be done merely for the purpose of setting up this old term to defeat the plaintiff; and under such circumstances he should leave it to them to presume it had been surrendered, which according to the learned Judge's report the jury expressly said they did. The Court of King's Bench, after hearing the case argued at considerable length, and taking time to consider, confirmed the learned Judge's direction.

Lord Chief Justice Abbott delivered the following judgment, according to the short-hand writer's note :

“ This was an action of ejectment tried before my brother Park at the last assizes for the county of Sussex. The title of the lessor of the plaintiff was upon a judgment recovered in the year 1808, against Richard Newman, for 8,000*l.* and a writ of elegit and inquisition thereupon in the year 1818, finding Richard Newman seised in fee of the premises in question. It was further proved, that the defendant occupied the land as a tenant, and had declared that he considered it to belong to

Richard Newman, and had delivered to him a notice of a judgment received in June 1818, from the lessor of the plaintiff. On the part of the defendant it was proved, that on the 23d of June 1762, Francis Hare Naylor had conveyed the premises in question, *inter alia*, to Thomas Carter, for a term of one thousand years, by way of mortgage, for securing the sum of 6,000*l.* That in the year 1779, the mortgage was paid off, and deeds were then executed, whereby, in effect, the term was assigned to William Denman, in trust for John Newman, a purchaser of the premises, and to attend the inheritance: That in the month of October 1814, the said Richard Newman, to whom the premises had descended from the purchaser John Newman, made a settlement upon his intended marriage; whereby he conveyed the premises to trustees and their heirs, to the use of himself for life, with a remainder to his intended wife for life, remainder to the issue of the marriage, and reversion to himself in fee: That in the year 1816, the said Richard Newman conveyed his life-estate to Sarah Newman, the mother of Richard, as a security for 1,162*l.*, which appears to have been money then due from him to her: That Mrs. Newman, the mother, died in the year 1817, having previously devised her interest to some other relations: That William Denman, to whom the term had been assigned in trust, to attend the inheritance as aforesaid, died about four years ago; and on the 19th of March last, his son took out administration to him, and executed a deed, purporting to be an assignment of the term, to a person therein named, in trust for the devisees of Mrs. Newman, the mother. Upon this evidence, two questions were made at the trial: first, whether the term might be presumed to have been surrendered and merged in the inheritance; and if it might not, then, whether it was a trust within the tenth section of the statute of

frauds, so as not to stand in the way of the execution on the judgment. The learned Judge thought this a case in which a jury might presume a surrender of the term ; and the matter being left to them, they found that the term had been surrendered. A motion was afterwards made for a nonsuit, according to leave given by the learned Judge. A rule to show cause was granted ; and the matter was argued before us very fully and ably. The same two points were made ; and with respect to the statute of frauds a further point also, it being contended, first, that the trust of a term of years is not within the tenth section of the statute ; and, secondly, if it be, yet in this particular case, the statute would not help the plaintiff, because the termor must be considered as a trustee, not for the debtor, but for the devisees of Mrs. Newman, at the time of issuing the execution. Upon these points, however, it is not necessary for us to pronounce any judgment ; because we are of opinion, that in this case the surrender of the term might lawfully and reasonably be presumed. It is obvious that if such a surrender had been made, it would not probably be in the power of the plaintiff to produce it, he being a stranger to the particulars of the title which his debtor had in the land. The principal ground of objection to the presumption was, that such a presumption had in no instance hitherto been made against the owner of the inheritance, the former instances being (as it was said) all cases of presumption in favour of such owner. But this proposition appears to be too extensively laid down. One of the instances in which it has been said that a surrender shall be presumed, is the case of a mortgagor setting up a term against his own mortgagee ; and this is said generally, and without distinction, between a mortgagee in fee or for years. But if such a term be set up against a mortgagee for years, and

a surrender presumed, the presumption is made against, and not in favour of, the owner of the inheritance. It is made against his interest at the time of the trial, but in favour of his honesty at the time of the mortgage; for if the term existed at the time of the mortgage, he ought in honesty to have secured the benefit of it to the mortgagee at that time, and not to have reserved it in his own power as an instrument to defeat his mortgage; and upon the same principle on which a surrender is presumed in the case of mortgagor and mortgagee, we think it may reasonably be presumed in the present case; though the principle is applicable not to the judgment-creditor but to other persons. One of the general grounds of a presumption is the existence of a state of things which may most reasonably be accounted for by supposing the matter presumed. Thus, the long enjoyment of a right of way by *A*, to his house or close, over the land of *B*, which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of the land; and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed. Where a term of years becomes attendant upon the reversion and inheritance, either by operation of law, or by special declaration upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion, thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor, and without supposing any surrender of the term; and therefore, in general, such enjoyment, though

it may be of very long continuance, may possibly furnish no ground to presume a surrender of the term. But where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a surrender from having been made; in such cases the things done or omitted may most reasonably be accounted for by supposing a surrender of the term, and therefore a surrender may be presumed. We think there are such things in the present case. In the year 1814, Richard Newman, the debtor, and then owner of the inheritance, made a settlement upon his intended marriage, which took place immediately. Upon such an occasion, the title and title-deeds of the husband would probably be looked into by professional men on the part of the husband, at least, if not on the part of the wife also; and notwithstanding the assertion of one of the learned gentlemen who argued this case on the part of the defendant, and by whom we were informed that it is not usual on such occasions to take any notice of an outstanding satisfied term, we cannot forbear thinking that such a term always ought to be, and frequently is, in some way noticed, either by the deed of settlement, or by some separate instrument; because, if not noticed, and the termor not called upon to assign the term to the uses of the settlement, nor any declaration of trust made of it to those uses, it may afterwards be made an instrument of defeating the settlement. The title-deeds usually remain with the husband, and if he be driven by necessity to borrow money, he may meet with a lender who has no notice of the settlement, and by handing over his deeds, and obtaining an assignment of the term to him and other

conveyances, give to him a title that must prevail both at law and in courts of equity against the settlement. The supposed practice of taking no notice of outstanding terms, on such an occasion, appears to have been insisted upon before Lord Hardwicke, in the case of *Willoughby v. Willoughby*, as applied to marriage settlements and purchases. But that very learned Judge, in giving his judgment in that case, says he had inquired of a very learned and eminent conveyancer, and could not find that there had been any such general rule; and he afterwards proceeds to say, "Where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the case of a purchase or mortgage, where the title-deeds always are, or ought to be, taken in; for if he has the creation and assignment of the term in his own hands, no use can be made of it against him." Such instances as these may account for the practice in many cases, but cannot constitute a general rule. If in the present case it had appeared that the deeds relating to the term were delivered to the trustees of the marriage settlement as one of the securities for the settlement, the case would have stood on a very different ground. The marriage settlement, however, is not the only occasion on which we think it may most reasonably be supposed that this term, if existing, would have been brought forward. It appears that in 1816 the same Richard Newman, being then indebted to his mother, and desirous of giving her security for the debt, prevailed upon his wife to join with him in conveying to her the interest they derived under the settlement. Upon this occasion, an assignment of the term, or a delivery of the deeds relating to it, would undoubtedly have been most important acts in favour of the mortgagee, because they would have pro-

tected the mortgagee against any subsequent use of the term to defeat her mortgage. On both these occasions, therefore, the term, if existing, could not have been wholly disregarded without either want of integrity on the part of Richard Newman, or want of care and caution on the part of the professional men engaged in those transactions. We think it more reasonable to presume a prior surrender of the term, than to presume such deficiencies. It certainly might not unreasonably be left to a jury to consider to what cause they would attribute these omissions, and this was done at the trial. It is true, that an assignment of the term was taken in a few days before the trial, for the alleged benefit of the legatees of the mortgagee, Mrs. Newman, on whose behalf, we were informed, the present cause was defended. But this tardy act cannot be of any avail, and leads not to any presumption. The assignment was made by the administrator of the person in whom the term had been vested, and the administrator would probably be ignorant of any previous surrender made by the intestate. The time for dealing with the term on behalf of the mortgagee was the date of the mortgage. An actual assignment of the term is more regarded than its mere quiescent existence. It will defeat the title to dower, which its existence only will not, according to the case of *Maundrell and Maundrell, Vesey, jun. vol. vii. page 567, and vol. x. page 246, and the cases there cited.* These observations respecting the settlement and the mortgage receive additional force from the consideration of their dates. They were both long subsequent to the judgment, and they are the acts of a person materially interested in protecting the land from the judgment, and excluding all questions on the subject of priority, or otherwise; in the case of the settlement, for the sake of his intended wife, and the issue that he might

expect by her ; and in the case of the mortgage, for the ease of the mortgagee, to whom he was so nearly related, and who also was evidently a favoured creditor. And it cannot be denied, that an actual assignment of the term would have been in many respects more operative against the judgment than its mere existence. In the case of the mortgage, it would have put an end to all question upon the statute of frauds, by making the termor specifically a trustee for the mortgagee before execution issued, according to the case of *Hunt v. Coles*, 1 Com. Rep. 226. For these reasons we think the verdict ought not to be disturbed, and the rule must therefore be discharged."

It will at once be observed, that this is a stronger case in favour of the existence of the term than that which we have been considering. There was no circumstance which pointedly called for an assignment of the term before the period when one was made ; for an assignment is never made by reason of descents, or of a marriage settlement. Previously to the sale, therefore, the presumption could not on any reasonable ground be let in ; and if not, such a presumption ought not to have been made at all. There could be no doubt which ought to be preferred, the purchaser, or the judgment-creditor. The latter obtained his judgment on a warrant of attorney, and slept on his security for ten years, and never had a specific lien on the estate, but a general security riding over the whole of the seller's property ; whereas the purchaser not only bought the estate itself without notice of the incumbrance, but had possession of all the deeds relating to the term, to the possession of which he was entitled as a purchaser. That circumstance alone, even as between two mortgagees of the estate itself, both of them equally innocent, would give the better right to the one holding the deeds (s). As

(s) *Stanhope v. Earl Verney*, 2 Eden, 81.

between a purchaser of the estate and a mere judgment-creditor, the rule applies with irresistible force. The purchaser, therefore, clearly had *the better equity*; and the presumption of the surrender, without any evidence upon which to ground it, let in the judgment-creditor on the estate in the hands of the purchaser, although, according to equity and good conscience, the creditor had no title to rank as such. *The presumption too let in the judgment-creditor on the estates provided for the wife and children by the marriage settlement; for the term could not be presumed to be surrendered against the purchaser, and in existence for the benefit of the wife and children.* And yet counsel in very great practice never knew an instance of an attendant term being re-assigned on a marriage, and have suffered hundreds of settlements to be executed without requiring such an assignment; so that the provisions made for very many families may be deeply incumbered if this new rule is to be followed. It will not be contended that the subsequent conduct of the purchaser of the life-estate ought to affect the wife and children of the seller; and yet it is undeniable that the circumstance of the purchaser not taking an assignment of the term was relied upon as a strong ground in favour of the presumption. The assignment was made by Denman's administrator, who was regularly such as next of kin, and not a mere stranger, procuring a limited administration *à bonis non*, for the purpose of assigning the term.

The above decision powerfully attracted the attention of the Profession. An ejectment was afterwards brought by the Newmans and Denman, against Putland, who recovered in the former ejectment, to recover back the estate (*t*). It came on at the assizes for Sussex, before Mr. Baron Garrow. Upon this ejectment the lessors of

(*t*) *Doe v. Putland*. See *Bartlett v. Downes*, 3 Barn. & Cress. 616.

the plaintiff proved a mortgage in fee of the estate to Thomas Markwick, in August 1814, by Richard Newman the son, who afterwards made the marriage settlement. By this mortgage, which it had not been considered necessary to produce upon the former ejectment, all deeds were granted; and it contained a *general* declaration of the trust of all terms of years for the mortgagee. The assignment of the term from Carter of the 7th of October 1779, was delivered over to Markwick, and was contained in a schedule of title-deeds made at the time of the mortgage, and signed by Markwick. By a deed dated the 9th of September 1819, Newman, the trustee of the one thousand years term, declared that he would stand possessed of it in trust for Markwick, and to secure the mortgage-money due to him. It was argued on the part of the defendant that it would be inconvenient that one Judge should direct a jury to presume a surrender of the term, and another direct the contrary. In the mortgage to Markwick there was no notice of any particular term, and no assignment was taken of the one thousand years term; Newman might therefore have parted with the term upon a new loan. The assignment in March 1819 was not at all for the benefit of Markwick; there was no acting upon the term from 1779 till 1819. No notice was taken of it in the marriage settlement. The learned Judge said, in charging the jury, that the facts were very different now to those proved on the former trial; and his present view was sanctioned by the suggestion in that very case. Here the deeds were handed over to the mortgagee before the settlement and conveyance, which accounts for the term not having been mentioned in those securities. The circumstance of the deed having been scheduled and handed over to Markwick shows that the term had not been surrendered. The

learned Judge directed the jury to find a verdict for the plaintiff. The jury found that the term was subsisting, and reserved any question of law.

In Trinity term 1820 the defendant moved for a new trial; the learned Judge who tried the cause re-stated the point, upon which he directed the jury, and observed that the case had excited a great deal of attention, and had occasioned the observations which have already been submitted to the learned reader (*u*). The Chief Baron said, that he should like to have the point argued on the presumption of surrender. From his habits in Westminster Hall, his Lordship added, he had travelled more than most men through the law relating to this case, and he did not think the doctrine of presumption a correct doctrine. It is a very serious point; and of late the doctrine has been carried to a very frightful extent. Mr. Baron Graham observed, that he had never suffered these presumptions, except in cases very strongly warranted, and where nothing was shown to the contrary. The Chief Baron added, that he never desired a jury to presume where he did not believe himself. The Court gave the defendant leave to argue the point upon the statute of frauds, upon a case to be stated (*x*). The point, therefore, as to the surrender of the term, was put at rest. The case upon the other point was prepared, but the suit has since been compromised, highly to the advantage of the Newmans.

The attention of Lord Chancellor Eldon was quickly drawn to the doctrine of the Court of King's Bench. In

(*u*) They appeared at the time in the shape of a letter from the author to Mr. Butler.

(*x*) It appears, therefore, that the presumption was made on the first ejectment, against the real

facts and merits of the case as they ultimately appeared. This powerfully shows that such a presumption ought not to be made on light grounds.

the Marquis of Townsend v. Bishop of Norwich, on the 27th January 1820, his Lordship observed :—

The legal interest in the advowson is unquestionably in Mr. Ainge, for a term of years, which, as I understand, has been expressly assigned to attend the inheritance. I do not inquire whether there may have been intermediate transactions since the creation of the term, which might induce some people to think a surrender of it should be presumed, further than to remark, that having in days, which perhaps may be thought days of yore, passed about two years, by no means unprofitably, in the office of Mr. Duane, and during which I had frequent opportunities of knowing the opinions entertained by Mr. Booth, Mr. Fearne, and other eminent conveyancers of that day, I well know that they were in the habit of proceeding on notions relative to satisfied terms, which, notwithstanding some modern decisions, I would not advise conveyancers to depart from (*y*).

Upon another occasion his Lordship observed: Formerly assignments were not considered necessary, because the old trustee would be a trustee for you, although you might not like him. It was never considered that the presumption of a surrender was to be made because some particular act had not been done. Lord Kenyon thought that some act must be done to presume a surrender; but now it is said, that if no act is done, you may presume a surrender: I cannot go the length which I see some late cases go, where there is no proviso. They have raised the presumption from a transaction where they say the term would have been assigned if not surrendered. I say that the circumstance does not let in that presumption; because the purchaser must know that the term will be held in trust for him, and he

may leave it where it is, to save the expense of taking out administration (z).

His Lordship again took occasion to observe, in *Hayes v. Bailey*, 15th March, 1820: There is now a modern doctrine of presuming surrenders. When I first came here, every old lawyer thought assignments of terms unnecessary; and as to the principle, that the term would be presumed to be surrendered if it had not been assigned on marriages, &c.; it was then thought that there was no occasion to assign, for if it had once been assigned to attend, the assignee will be a trustee for you. They then never thought it necessary to have it assigned on such occasions. I remember Mr. Lloyd used to say, that an old term was worth two inheritances. You see Lord Kenyon got as far as this before he would presume a surrender; you must show that there had been some dealing with it; but it seems to be the law now, that if you show that there has been no dealing with it you are to presume it surrendered (a).

In the late case in the Exchequer, of *Deardon v. Lord Byron*, the Chief Baron again expressed his disapprobation of this doctrine of presumption (b).

Upon the appeal in the House of Lords, in *Cholmondley v. Clinton* (c), the Lord Chancellor, with a reference to a deed of the year 1704, by which a term of two hundred years was created, with a proviso for the cesser of the term, but which, as the circumstances upon which that term was to determine had not taken effect, remained a subsisting term, and was assigned in 1811, observed:—
“ I would wish to call your Lordships most particular attention to this part of the case, because, unless I now misunderstand, and unless I have misunderstood for a good many years, in which I have been laboriously, in

(z) From the Author's note.

(b) MS.

(a) From Mr. Jacob's note.

(c) MS.

different situations, discharging the duties which belong to the Profession of which I have the honour to be a member, the doctrine upon this subject, there arise out of the circumstances which I am about to mention many important observations bearing upon this case, with a great degree of importance, because bearing, unless I misunderstand the case very much, upon the titles to property in this kingdom. My Lords, this deed of 1704 provides, as I before stated, for the cesser of the term, that is, of the interest which the term creates. Let me suppose for a moment, that there had been no such declaration with respect to the cesser of the term, or what comes to the same thing, that the state of things has not yet arisen in which the term is to cease, that term created in 1704, would, according to all the ideas that I ever had of the law of this country (I am speaking now of what would have been done twenty-five years ago, instead of speaking particularly of the present time,) be considered as a term which, whether the instrument that created it or not did so declare, would be attendant upon the inheritance when the ends and trusts of it were satisfied; that is, it would be considered as a term, where neither presumption that it was satisfied, nor presumption that it was surrendered, would at that period have been entertained, unless there had been some dealing with the term which would authorize a presumption either of the one nature or of the other, but it would be taken to be, what, in the language of those who are now no more, I have often heard it stated to be, the best part of a title, namely, that old term that could be got in to protect the inheritance. And I conceive that such a term, whether there was any intention that it should or should not attend the inheritance, would be a term held in trust to attend the inheritance, protecting the equities of all who had equities during the existence of that term; all the estates, to a cer-

tain extent, that is, during the duration of the term, would be equitable estates, but protecting them all according to the due course, and order, and priority in which they existed, and according to their equities."

In giving judgment in the same case upon the hearing at the Rolls, Sir Thomas Plumer appeared also to be of opinion against the presumption in such cases (*d*).

Since the decision in *Doe v. Hilder* the point has been repeatedly debated before the different Masters in Chancery, upon objections taken by sellers to procure representations to terms of years, which, they insisted, ought to be presumed to have been surrendered; but the general and prevailing opinion has been that that doctrine cannot be maintained; and the Masters have acted upon that principle.

And finally, in *Aspinall v. Kempson*, upon a motion before the Lord Chancellor for a new trial, in which some gentleman at the common-law bar cited *Doe v. Hilder*, his Lordship observed, "it is not necessary to consider much the doctrine of presumption with reference to the present case, but the case of *Doe v. Hilder* having been alluded to, and having paid considerable attention to it, I have no hesitation in declaring that I would not have directed a jury to presume a surrender of the term in that case; and for the safety of the titles to the landed estates in this country, I think it right to declare that I do not concur in the doctrine laid down in that case (*e*)."

We may, therefore, be justified in considering the law to stand as it did before the decision in *Doe v. Hilder*; and conveyancers of course will follow the advice of the Lord Chancellor, and not depart from the practice which they have hitherto followed.

(*d*) 2 Jac. & Walk. 158.

(*e*) L. J. Hall, 5 Dec. 1821, from Mr. Walker's note.

The Vice-Chancellor, Sir John Leach, in two late cases upon specific performance, as between a seller and a purchaser, presumed a term to be surrendered which had *not* been assigned to attend the inheritance, and which for a long period had not been disturbed. The first case was *Emery v. Growcock* (*f*). The other case was *ex parte Holman* (*g*), where it appeared, by the abstract of the title delivered to the purchaser, that, by indenture bearing date the 24th of December 1735, and made between Thomas Baker of the one part, and John Marsh of the other part, the said Thomas Baker did grant and demise, amongst other hereditaments, the messuage and premises in question unto the said John Marsh, his executors, administrators and assigns, for the term of five hundred years, subject to redemption on payment by the said Thomas Baker, his heirs, executors, administrators and assigns, unto the said John Marsh, his executors, administrators or assigns, of the sum of 205*l.* on a certain day therein mentioned, that the said sum was not paid accordingly, but that the same with all interest was paid to the executor of the said John Marsh on the 6th day of October 1750, as appeared by a receipt indorsed on the said indenture, but no assignment or surrender of the said premises comprised in the said term was ever made and executed, and therefore the purchaser insisted that the sellers should at their own expense discover the personal representatives of the said John Marsh, and procure an assignment from them of the said term to a trustee for the purchaser to attend the inheritance.

The Master to whom the title was referred was of opinion that the term of five hundred years was outstanding, and was then vested in the personal representative or representatives of John Marsh the termor, but it did not appear by any evidence before him who was or were

(*f*) Mar. 1821, MS. 6 Madd. 54.

(*g*) 24 July 1821, MS.

such personal representative or representatives ; and the Master was of opinion that it was expedient and necessary that the said term should be assigned to a trustee for the purchaser, and that the expense of deducing the title thereto, and of procuring the said term to be so assigned, should be borne and paid by the vendors.

In an intermediate deed, dated in July 1749, the term was noticed, but in no other deed was it mentioned ; and there were three conveyances of the fee upon sales, one in 1784, another in 1791, and the other in 1792. The Vice-Chancellor was of opinion that a surrender of the term must be presumed.

V. The importance of obtaining an assignment of all outstanding terms cannot be too strongly impressed on purchasers. If a purchaser has no notice, and happens to take a defective conveyance of the inheritance, defective either by reason of some prior conveyance, or of some prior charge or incumbrance, and if he also takes an assignment of the term to a trustee for him, or to himself, where he takes the conveyance of the inheritance to his trustee, in both these cases he shall have the benefit of the term to protect him ; that is, he may make use of the legal estate of the term to defend his possession, or, if he has lost the possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance (*h*).

Lord Hardwicke was of opinion that the protection arising from a term of years, assigned to a trustee for a purchaser, should extend generally to all estates, charges and incumbrances, created intermediate between the raising of the term and the purchase (*i*). And this doctrine, unqualified as it is, seems correct. For as the term

(*h*) Willoughby v. Willoughby, 1 Term Rep. 763, *per* Lord Hardwicke ; and see For. 69.
 (*i*) See 1 Term Rep. 768.

will prevail over a strict title to the inheritance, it will of course be a protection against judgments, mortgages, and all other incumbrances and estates less than a fee ; and it may, in like manner, be used as a shield against an act (*k*), or commission (*l*) of bankruptcy.

In the late case of the King *v.* Smith (*m*), however, the Court of Exchequer held that a term of years, which had been assigned to a trustee for the crown debtor (*n*), would not protect a purchaser against crown debts, although he purchased *bond fide* and without notice (*l*). This point had previously been considered by most of the leading characters in the Profession, some of whom have since filled the highest judicial situations ; and the general opinion of the Profession appears to have been, that a purchaser might protect himself against crown debts, by a legal term of years created previously to the right of the crown attaching on the estates, where he had not notice, express or implied, of the debt due to the crown, or of the vendor being an accountant to the crown. They relied on the analogy between this case and the general rule respecting judgments and recognizances, against which a purchaser may protect himself by an outstanding legal estate, unless

(*k*) Collet *v.* De Gols, For. 65.

(*m*) Excheq. 2d March, 1804,

(*l*) Hithcox *v.* Sedgwick, 2 Vern.

MS. Appendix, No. 16.

156, reversed in *Dom. Proc.* See

(*n*) See 13 Price, 656.

post. c. 17, this point considered.

(*l*) It has been determined that in the case of a purchase for a valuable consideration, without notice and without fraud or covin, from a *simple contract* debtor of the king, the lands are not bound by such simple contract debt. The King *v.* Smith, 1 Wight. 34. In that case, the general words in the statute of 13 Elizabeth, c. 4, received a limited and proper construction. In Wilde *v.* Fort, 4 Taunt. 334, in which it was not necessary to decide the point, the rule was laid down with apparently too much latitude, that every person who has received money belonging to the crown, every accountant of the crown for money of the crown received, falls within the act. See Casberd *v.* Ward, 6 Price, 411.

he had notice of them previously to completing his purchase. The late Lord Kenyon, in an opinion on this point, treated the right of the crown as not superior to that of a subject. Indeed, the point may fairly be said to have received what was tantamount to a judicial decision, previously to the determination of the Court of Exchequer. When Mansfield, Chief Justice of the Common Pleas, was Solicitor-general, he gave an opinion in favour of the right of the crown to extend lands in the hands of a mortgagee, although the legal estate had never vested in the mortgagor, but had been conveyed to the mortgagee by the trustees in whom it had been vested in trust for the mortgagor. The question underwent great consideration, and it was discovered that there was an old term of years, to the benefit of which the mortgagee was clearly entitled in preference to any other person, although it was not actually assigned to a trustee for him. The case was again laid before the Solicitor-general, who then wrote an opinion that the title of the mortgagee would be preferred to that of the crown. He stated, that upon a short inquiry before he wrote his former opinion, it had been represented to him, that estates held in trust for a debtor of the crown were usually seized under extents, and were considered as bound by his debts in the same manner as those of which he was legally seised. He had since desired a further search to be made, and was then informed that no instances were to be found in which a trust-estate of such debtor fairly parted with to a purchaser without notice had been deemed to be liable to the debts of the crown, and in consequence of this information his opinion then inclined in favour of the mortgagee. And he gave a similar opinion on this point in the year 1801, so that he had not seen any reason to alter his opinion after a lapse of nearly twenty years.

The principal grounds of the determination in the *King v. Smith* were three:—1st, that the lands of a debtor to the crown might be extended into whatever hands they might have been aliened, subsequently to their becoming liable to the crown; 2dly, that the estates of which the debtor was *cestui que trust* might be extended; and 3dly, the decision in the case of the Attorney-general *v. Sands* (o). The two first positions of the Court may be admitted to be law, without, as it should seem, at the same time admitting that a purchaser cannot protect himself against the crown by an outstanding legal estate. Indeed it was the third ground upon which the Court principally relied, and built their decree.

The determination in the case of the Attorney-general *v. Sands* was, that the trust of a term attendant on the inheritance was not forfeited by the felony of the *cestui que trust*, because it was no more than an accessory to the inheritance, which was not forfeited. In the *King v. Smith* the Court of Exchequer thought that the converse of this case must be taken to be true. The term was not forfeited, because the inheritance was not forfeited; but if the inheritance had been forfeited, the term must have been forfeited. The case of the Attorney-general *v. Sands* was decided in a court of equity, and appears wholly to depend upon the rules of equity as to attendant terms; and on the like principle, it may be thought that the same Judges would have denied relief against a purchaser in a case similar to that of the *King v. Smith*; and that no such relief could at this day be granted. If any remedy, therefore, lies against the purchaser, it must be at law. Now at law the term in the trustee is a term in gross. A legal title, prior to the right of the crown, must prevail at law; and the Court ought

(o) Hard. 2 Freem. 3 Cha. Rep.

not to advert to the trust, only for the purpose of taking the protection of the term from the *bonâ fide* object of the trust, for even the *arts* of the law in introducing collateral warranties, discontinuances, and non-claims *to protect the possession and strengthen the rights of purchasers*; have been the subject of commendation from the great Lord Nottingham; and it is admitted that if the term be in gross, an assignment before any actual extent will stand good against the king's debt (*l*). Lord Hardwicke's decision in *Willoughby v. Willoughby* is an elaborate performance, and was certainly pronounced after great consideration. Every point was adverted to, and yet his Lordship lays the rule down generally, that a purchaser may protect himself against all mesne incumbrances by a prior legal term, and does not except the case of the crown. And in pronouncing judgment in the *Attorney-general v. Sands*, the Chief Baron observed, that the term was only kept on foot to avoid incumbrances which might affect the inheritance; and yet, although he was discussing the rights of the crown, he did not seem to consider that the term would not prevail over crown debts. It is not denied, that in general where a term is attendant on the inheritance, if the king extends the inheritance he shall have a right to the term (*q*); but the question here turns upon what, it is conceived, ought to form an exception to that rule, viz. a purchase by the person claiming the benefit of the term *bonâ fide*, and without notice of the claim of the crown.

It remains only to observe, that in this commercial country, any decision that tends to clog the free alienation of property, and to render the titles of fair purchasers insecure, cannot but be productive of the most serious

(*p*) 2 Vern. 390.

(*q*) See the 2d resolution in *Nicholls v. How*, 2 Vern. 389.

consequences, and well demands the interference of the legislature, if the law is too well settled to be overruled.

In a still later case (*r*), in which the case of *King v. Smith* appears to have been forgotten, where a man having agreed before marriage to purchase and settle estates, entered into bonds to the crown, and then made a purchase, and afterwards settled the estate according to the articles, it was held that a mortgage term assigned to attend upon the purchase did not protect the inheritance against the crown debt, *because the settlement was voluntary*. There was no covenant in the articles which specifically bound the lands. The assignment of the term therefore could not, it was held, defeat the right of the crown.

But where the term has never been assigned to attend for the crown debtor, it will not be affected by the claim of the crown in the hands of a trustee for a *bond fide* purchaser. Therefore, where upon a purchase a term of 1,000 years was limited to the seller to secure a portion of the purchase-money and subject to the term, the fee was limited to the purchaser; the mortgage was not paid off by the purchaser, but he sold the property, and the second purchaser paid off the mortgage, and took an assignment of the term to a trustee for himself to attend the inheritance: it was held that the term was not bound by the crown debt of the first purchaser (*s*).

Mr. Butler justly observes, that “a term should never be relied on, unless proof can be obtained easily, and at a small expense, of the instruments and acts in law, which must be proved to establish the creation and deduction of

(*r*) *Rex v. St. John*, 2 Price, 317. See *Rex v. Hollier*, 2 Price, 394.
 (*s*) *Rex v. Lamb*, 13 Price, 649.

the term. It should also be ascertained, that its situation is such as enables the party entitled to it, to avail himself of it in ejectment (*t*).” And to enable the purchaser to avail himself of the term, it is indispensably necessary that he should not have notice, either express or implied, of the incumbrance or title against which he is desirous of using the term as a protection. Mr. Powell, indeed, although he admits that terms, the purposes of whose creation are answered, and which have been expressly assigned to attend the inheritance, will not be any protection to a purchaser of the inheritance who had notice of any judgments, &c. yet contends, that where a purchaser of the inheritance obtains a term in gross, the purposes of whose creation were not answered at the time of the purchase (1), or a term the purposes of whose creation were answered, but which had not been expressly assigned to attend the inheritance, but merely waited upon the freehold by construction of equity, such purchaser can defend his possession by the term, although he had notice of any intervening judgment.

This is an attempt to establish a *new* distinction between a term assigned upon an express trust to attend the inheritance, and a term attendant by the construction of equity, an attempt which Lord Hardwicke appears to have overruled in the case of *Willoughby v. Willoughby*; and it would be very imprudent for a purchaser of an estate in any case to rely on a term of years, as a protection against any incumbrance, of which he has express or implied notice.

(*t*) N. (1), s. 13, to Co. Lit. 290 b.

(1) In this case the purchaser could of course defend himself against any subsequent incumbrancer to the extent of the subsisting charge on the term at the time of the purchase. It has, indeed, been thought that if there are two mortgagees, and the first in point of charge buy the inheritance, he lets in the other on the estate discharged of the prior mortgage. See, however, *Kennedy v. Daly*, 1 Scho. & Lef. 355.

It is, however, settled by a series of authorities (*u*), that a purchaser may protect himself against the dower of the vendor's wife, by a term created previously to her right of dower attaching on the estate, although he had actual notice of the marriage, and of her title to dower; a protection, as we shall hereafter see (*x*) to which a purchaser with notice is not entitled in any other instance, or against any other person.

The term, however, must be actually assigned to a trustee for the purchaser, if it is intended to be used as a bar to the wife's dower (*y*); because, by the rules of equity, every term attendant on the inheritance follows it in its various modifications, and in the charges and incumbrances which attach on it, or are created in it (*z*); and therefore, upon the marriage of a man seised of lands of inheritance, in which there is a term outstanding, a right

(*u*) *Lady Radnor or Bodmin v. Rotherham or Vendebendy*, Prec. Cha. 65; 1 Vern. 170. 356; 2 Cha. Ca. 172; Show. P. C. 69; *Brown v. Gibbs*, *Wray v. Williams*, *Dudley v. Dudley*, Prec. Cha. 97. 151. 241; and see *Banks v. Sutton*, 2 P. Wms. 700 (I); *Hill v. Adams*, or *Swannock v. Lyford*, 2 Atk. 208; Ambl. 6; *Butler's n. (1) to Co. Litt. 208 a*; *Wynn v. Wil-*

liams, 5 Ves. jun. 130; *D'Arcy v. Blake*, 2 Scho. & Lef. 387; and see *supra*, p. 331.

(*x*) *Infra*, ch. 16.

(*y*) See *Maundrell v. Maundrell*, 7 Ves. jun. 567; 10 Ves. jun. 246, particularly the close of the judgment.

(*z*) See *Charlton v. Low*, 2 P. Wms. 328.

(F) Note, this case is generally thought to be overruled, but Mr. Powell has endeavoured to show, that it is not affected by later decisions. See 2 Mort. 731, 4th edit.; and in a manuscript note of the Attorney-general *v. Scott*, *penes auctorem* (For. 138,) Lord Talbot is reported to have said, that the reason of the decree in *Banks v. Sutton* was different, for there the direction of the will was, that the legal estate should be conveyed to Sutton, and the wife married him on the expectation of that estate, and it was a fraud in the husband not to call for the settlement. See a fuller note of this case than that which is published, Appendix, No. 17. In the late case of *D'Arcy v. Blake*, 2 Scho. & Lef. 387, it was said by the Court, that what was thrown out by Sir Joseph Jekyll, in *Banks v. Sutton*, had been long overruled.

of dower attaches on the inheritance, by the act of law, and in equity the term is equally bound with the inheritance; and as the claim of a purchaser is not more favoured in equity than that of a dowress, a purchaser will not be entitled to the benefit of an outstanding term, to the prejudice and in exclusion of a dowress. Indeed the decision (*a*), that a purchaser could defend himself against a claim of dower by a term assigned to a trustee for him, proceeded not on principle, but on the universal practice and opinion of conveyancers in that respect; for (*b*) the Court of Chancery and House of Lords were of opinion, that if they were not to permit that to be so, it would be to overturn the general rule which had been established and practised by many titles to estates, and tend to make such titles precarious for the future. The same reason does not apply where the purchaser neglects to take an assignment of the term; it having always been the general understanding and opinion of conveyancers that, to protect against dower, the term must be actually assigned to a trustee for the purchaser.

In *Swannock v. Lifford* (*c*), Lord Hardwicke appears to have considered it clear, and it was admitted at the bar, that if a man before marriage conveys his estate privately, without the knowledge of his wife, to trustees, in trust for himself and his heirs in fee, that will prevent dower; and it appears that this was practised by a reverend Judge of equity, Mr. Sergeant Maynard, who made a lease to his servant the day before his last marriage (*d*). But the counsel who argued for the respondent in *Radnor v. Vende-*

(*a*) *Lady Radnor v. Vendebendy*, Show. P. C. 69.

(*b*) *Per* Lord Hardwicke. See Butler's n. *ubi sup.*

(*c*) Butler's n. (1) to Co. Litt. 208 a; and see 2 P. Wms. 709.

Note, in the case of *Bottomley v. Lord Fairfax*, Prec. Cha. 336, the Court did not advert to a conveyance made *immediately* before marriage.

(*d*) See Show. P. C. 71.

bendy, before the House of Lords, seem to have admitted, that if a husband *just before marriage* make a long lease on purpose to prevent dower, and the woman *expecting the privileges which the common law gives to women married*, survive him, equity may interpose ; and this doctrine has been distinctly recognized by a learned Judge and author (e). And as this opinion may be supported by weighty reasons, a purchaser cannot, it is conceived, be advised to rely upon a legal estate, created in fraud of the rights of marriage, as a protection against the wife's dower (f).

It hath been just observed, that by the rules of equity every term attendant on the inheritance follows it in its various modifications, and in the charges and incumbrances which attach on it, or are created in it. Now it is a consequence of this rule, that whenever the inheritance is conveyed or charged, the trustee of the term becomes a trustee for the person in whose favour the estate is conveyed or charged, to the extent of his claims on the estate. If the trustee have notice of such purchase or incumbrance, his conscience will be affected ; and if he assign the term to a subsequent purchaser, or incumbrancer, it would be a breach of trust, and he would in equity be decreed to make satisfaction (g). A trustee, therefore, of a term to attend the inheritance, cannot be advised to assign the term to *any* purchaser or incumbrancer, unless he is satisfied that his immediate *cestui que use* has not done any prior act to charge the inheritance (h).

(e) Gilb. Lex Prætor. 267.

(f) As to settlements by women previously to marriage, in derogation of the marital rights, see *Countess of Strathmore v. Bowes*, 2 Bro. C. C. 345, 1 Ves. jun. 22, and the cases there cited, which may be thought, in some measure,

to apply to the point under consideration.

(g) 1 Term Rep. 771.

(h) See 1 Pow. Mort. 507, 508, 4th edit. ; *Evans v. Bicknell*, 6 Ves. jun. 174. *Ex parte Knott*, 11 Ves. jun. 609.

As a trustee ought to be satisfied, that the person by whose direction the term is assigned, is the person entitled to require the assignment, it is usual, by way of authority to the trustee, to recite all the instruments, &c. affecting the fee, from the time the term was created to the date of the deed of assignment; and this is very commonly done, even where the term has been assigned to attend the inheritance. In the latter case, however, such a recital is both unnecessary and improper; for the trustee can only be affected by the acts of his own *cestui que trust*; and therefore, where a term has been actually assigned to attend the inheritance, on a future assignment of it, it is only necessary to recite the deed creating the term, that by divers conveyances and assurances the fee became vested in *A*, (the person requiring the assignment); and that by divers assignments and acts in law, and ultimately by such a deed (the assignment to attend) the term became vested in the trustee, in trust for *A*; and then any instruments affecting the fee, since the last assignment of the term, to attend the inheritance, should be recited.

VI. Before we quit this very interesting subject, let us inquire in what cases a term of years will attend the inheritance without an express declaration of trust for that purpose (*i*).

First then, it is a general rule, that whenever a term would merge in the inheritance if united, it shall attend, if in a different person, without an express declaration, by implication of law founded on the statute of frauds (*k*).

(*i*) See an admirable opinion of Mr. Fearne's respecting terms of years, 2 Coll. Jur. 297. Mr. Powell has in the last edition of his Treatise on Mortgages inserted this opinion without acknowledgment. See 1 Mort. 483—489.

(*k*) See 1 Bro. C. C. 70.

And the custom of London shall not prevail over this operation of law (*l*).

Therefore, where a person purchases the inheritance in his own name, and takes an assignment of a term in the name of a trustee (*m*); or takes a conveyance of the fee in the name of a trustee, and an assignment of a term in his own name (*n*); in both these cases the term attends the inheritance, unless there be an express declaration to the contrary, whether the term be purchased or obtained before or after the purchase of the fee. And in general there is no difference between an assignment of a term to a trustee, in trust to attend the inheritance, and an assignment to a trustee, in trust for the purchaser, his executors, administrators and assigns (*o*).

So the same rule prevails where a man possessed of a term for years contracts for the inheritance, for the vendor stands seised in trust for the purchaser from the time of the contract (*p*).

And where, by reason of an intermediate term outstanding, a term cannot merge, although vested in the purchaser together with the fee, yet if the purchaser be entitled to such outstanding term, even the term vested in the purchaser, and which cannot merge, shall attend the in-

(*l*) *Greene v. Lambert*, 1 Vern. 2, cited; *Dowse v. Derivall*, *ibid.* 104; 2 Vern. 57; Reg. Lib. A. 1683, fol. 283. It is said in the decree, that the lease and conveyance were in law one conveyance; *Rich v. Rich*, 2 Cha. Ca. 160.

(*m*) *Tiffin v. Tiffin*, 1 Vern. 1; 2 Cha. Ca. 49. 55; *Whitchurch v. Whitchurch*, 2 P. Wms. 236; 9 Mod. 124; *Gilb. Eq. Rep.* 168; *Goodright v. Sales*, 2 Wils. 829.

(*n*) *North v. Langton*, 2 Cha.

Ca. 156; *Dowse v. Derivall*, 1 Vern. 104; *Attorney-general v. Sands*, 3 Cha. Rep. 19.

(*o*) *Best v. Stamford*, Prec. Cha. 252; *Tiffin v. Tiffin*, 1 Vern. 1; *Holt v. Holt*, 1 P. Wms. 374, cited; *Pitt v. Cholmondley*, Chancery, 9 Nov. 1751, MS.

(*p*) *Capel v. Girdler*, Rolls, 16th March 1804, MS.; 9 Ves. jun. 509; *Cooke v. Cooke*, 2 Atk. 67. *Vide supra*, ch. 4.

heritance, without any express declaration for that purpose (*q*).

And even if the purchaser cannot obtain an assignment of the whole term, yet, if a nominal reversion only, as a reversion of a few days, be left outstanding, so much of the term as is assigned to a trustee for the purchaser will be deemed attendant on the inheritance, without any express declaration for that purpose. But where the term is subject to rents or charges in favour of other persons, whereby the purchaser has not *substantially* the whole *beneficial* interest in the estate, there an express declaration is necessary to make the term attendant. The mere intent of the purchaser to purchase the whole interest, and that the term should attend the inheritance, will not vary the case.

The two last propositions appear to be established by the case of *Scot v. Fenhoulet* (*r*). From the imperfect statement of the facts in this case, it is difficult to understand the ground of Lord Thurlow's decision; and it has been generally thought that the decree turned on the reversion, which the purchaser could not get in (*s*). The facts, as stated in Lord Thurlow's judgment, on the rehearing, reported in *Brown*, are shortly these: Mrs. Rudger was seised in fee of the estate, subject to two terms of years, upon which it should seem small rents were reserved; which terms were vested in trustees in trust for Mrs. Rudger for life, and for raising certain annual and gross sums of money. Sir Andrew Chadwick purchased of Mrs. Rudger the fee-simple estate, and so

(*q*) *Whitchurch v. Whitchurch*, 2 P. Wms. 236; 9 Mod. 124; *Gilb. Eq. Rep.* 168; and see 1 Bro. C. C. 170.

(*r*) 1 Bro. C. C. 6. 9.

(*s*) See *Capel v. Girdler*, MS. and 9 Ves. jun. 509; 1 Cruise's Dig. 513, s. 17, and the marginal abstract of the case in *Brown*.

much of the terms as related to it; and the trustees executed their power by granting a derivative lease to trustees for Sir Andrew, with a nominal reversion (eleven days) to themselves. Lord Thurlow admitted, that Sir Andrew meant to purchase the whole interest, and that his intent was, that the terms should attend the inheritance. If they did attend the inheritance in this case, it must, his Lordship said, be by implication of law, as there was no express declaration; and, after showing that the case of *Whitchurch v. Whitchurch* (*t*) did not apply to the case before him, because that there no interest was outstanding, except in form; he added, "Sir Andrew Chadwick might have given these terms to a stranger, and if the inheritance descended, the heir at law might demand the rents reserved by the leases. It is said to be extremely plain, that Sir Andrew Chadwick meant to consolidate the interests: this is begging the question. It is true he meant to take the largest interest he could, but by no means apparent that he meant to consolidate the interests. *I lay no stress on the days of the reversion, for it was meant only as a nominal reversion; they did not mean to reserve a substantial interest.* It would be necessary there should be an express trust to make this attendant on the inheritance; the transaction does not supply a necessary construction of law. It is a very nice point, and a very new one; whether the intent to purchase the whole interest is sufficient to make the term attendant on the inheritance. *The impossibility he was under of purchasing the whole, rendered an express declaration necessary to make it attend the inheritance.*" Now, at first sight, it certainly does seem impossible to reconcile those parts of the judgment which are printed in italics. But it appears by an opinion of Mr. Fearne's (*u*), in consequence of which the cause was

(*t*) *Supra.*

(*u*) 2 Collect. Jurid. 297. No. 6.

reheard, that rents were reserved by the leases granted by the trustees to Sir Andrew Chadwick, and the usual covenants were entered into by him, and the trustees were restrained to that mode of making a title by their trust, which required a reservation of rent, and the usual covenants.

This fact at once reconciles every part of the judgment. Lord Thurlow was of opinion, that the reversion of itself was immaterial, but that the rents reserved by the leases rendered an express declaration necessary to make the terms attend the inheritance. And Mr. Fearne was also of opinion, that the terms would not be attendant, if there was any intervening *beneficial* interest in any third person, to divide the ownership of the term from the inheritance. But as he was told, that the rents reserved to the trustees upon the terms were afterwards purchased by Sir Andrew, he thought the terms did attend the inheritance, although there was not any express declaration for that purpose; and he expressly delivered his opinion, subject to this fact, which he had learned from verbal information only. By Lord Thurlow's decree on the rehearing, it appears clearly that the rents were not purchased, and consequently Mr. Fearne was misinformed in this respect.

Mr. Fearne's opinion on this point is very strongly marked; for he thought, that if there was any intervening outstanding *interest* between the ownership of the term and the inheritance, even an express declaration of trust could not make the terms attendant. This, however, was going too far; and Lord Thurlow, who had probably seen this opinion, addressing himself to the cases in which a term would attend the inheritance, said, that might be by two ways: first, by express declaration; and then, whether the trust would or would not merge, and whether the reversion be real or only nominal, it must be attendant on the inheritance.

We have seen that where a term attends the inheritance without any express declaration, it is by implication of law; and this implication, like all implications of law, or equitable presumptions, may be rebutted by even a parol declaration of the person in whose favour the implication or presumption is made (*x*).

VII. A term for years attendant on the inheritance, whether by express declaration or by implication, is governed by the same rules as the inheritance itself is subject to. Therefore it will not be forfeited by the felony of the owner of the inheritance (*y*); but if the inheritance descends to the heir, the term will go with it (*z*).

So it seems, that such a term cannot pass by a will not executed according to the statute of frauds (*a*). But it appears to have been thought, and the distinction, it is conceived, may be supported on very solid grounds, that where a term attends the inheritance merely by operation of law, the owner may *expressly* bequeath it by a will not executed with the solemnities required by the statute (*b*).

It is clear, that where the deviser intended the inheritance to pass, but, by reason of the informality of the will, it descends to the heir, the term shall not go to the devisee, but shall follow the inheritance in its devolution on the heir (*c*).

So where a termor for years, having contracted for the fee, made his will, whereby, after reciting that he had purchased the term, and contracted for the fee, a convey-

(*x*) See *post.* ch. 15.

(*y*) Attorney-general v. Sands, 1 Cha. Rep. 19; Hard. 488.

(*z*) Thruxton v. Attorney-general, 1 Vern. 340, 357.

(*a*) Tiffin v. Tiffin, 2 Cha. Ca. 49, 55; 2 Freem. 66; Whitchurch v. Whitchurch, Gilb. Eq.

Rep. 168; Villiers v. Villiers, 2 Atk. 71. *Note*, Nourse v. Yarworth, Finch, 155, was before the statute of frauds.

(*b*) See 9 Mod. 127; and see 2 Collect. Jurid. 276.

(*c*) Cases cited *ante*, n. (*a*).

ance of which could not then be obtained, he declared, that when a conveyance could be had, the estate should be settled to the uses mentioned in his will, and directed that the remainder of the term should remain and be attendant on the inheritance. The person who contracted to sell the fee was not owner of it, and the owner sold it to another person. Sir Joseph Jekyll held, that the testator intended to pass the inheritance; and although he had it not, yet the term could not pass by the will, as such a construction would be contrary to the testator's intention (*d*).

As the inheritance of an estate is not liable to simple contract debts, it follows, on the principle before noticed, that a term attendant on the inheritance is not personal assets for the payment of debts (*e*), but it is generally stated that such a term is *real* assets:—This is, however, a very incorrect expression: the term itself is not real assets, but is merely attendant on the inheritance, which is. In *Chapman v. Bond* (*f*), it appears to have been thought, that although the term was in a trustee, yet if it attended the inheritance by construction of equity only, it should be assets in equity for payment of the owner's debts, in like manner as a term taken in his own name would be assets at law. But this opinion is clearly overruled; and where a term is in a trustee, the same rules prevail on this point, whether the term be attendant by express declaration or not (*g*). In one case it is made a

(*d*) *Bret v. Sawbridge*, 3 Bro. P. C. 141, Tom. ed.; and see *Fearne's Ex. Dev.* by Powell, 145, n. (*a*). S. C. Appendix, No. 18. This note of the case will, I hope, be acceptable to the reader. It contains a concise statement of the facts, and Sir Joseph Jekyll's judgment, which is, I believe, not in print, and comprises some in-

teresting remarks on executory bequests of terms.

(*e*) *Thrupton v. Attorney-general*, 1 Vern. 340; *Tiffin v. Tiffin*, 1 Vern. 1.

(*f*) 1 Vern. 188.

(*g*) *Baden v. Earl of Pembroke*, 2 Vern. 52, 213; 2 Trea. Eq. c. 4, s. 6.

query, whether if tenant in tail contract debts by bond and die, and it can be made to appear that some of his ancestors, who bought the estate, found an old mortgage upon it for a long term of years, which was kept on foot to wait upon the freehold and inheritance, such lease in equity would not be assets in the hands of the heir in tail, for it is equity only makes such leases descend, and it is the highest equity, that a man's debts should be paid (*h*). There is not, however, the least foundation for this doubt. Equity, in this respect, follows the law, and at law the estate is not bound.

But where the inheritance is in trustees, and the owner has a term in his own name, and dies indebted, the term, although limited to attend the inheritance, will be liable to debts, for it is assets at law (*i*); and equity here follows the law (*k*), and therefore a purchaser should never take the term in his own name, if he do not wish his estate to be personal assets.

If after the death of a person who has taken an assignment of a term in his own name, and a conveyance of the inheritance in the name of a trustee, his personal representative assign the term to attend the inheritance, it will cease to be assets at law; and the creditors or legatees will be entitled to satisfaction against the personal representative, as for a *devastavit*; and may, it should seem, follow the term in equity, unless as against a *bond* purchaser without notice, against whom the term will be severed or disannexed from the inheritance in favour of the creditors or legatees, although the purchaser did not take an assignment of the term, or was even not aware of its existence (*l*).

non. 11 Mod. p. 5.

Wuxton v. Attorney-general,
sup.; *Chapman v. Bond*,
188; *Attorney-general v.*
Hard. 488.

(*k*) See 2 Cha. Ca. 49; *Earl of Pembroke's case*, 9 Mod. 125, cited.

(*l*) *Charlton v. Low*, 3 P. Wms. 32.

SECTION III.

Of Attested Copies.

THUS have we taken a cursory view of the doctrine respecting terms of years, a learning which demands the practical conveyancer's peculiar attention; and we are now to consider in what cases a purchaser is entitled to attested copies of the title-deeds.

If a purchaser cannot obtain the title-deeds, he is, as we have already seen, entitled to attested copies of them at the expense of the vendor, unless there be an express stipulation to the contrary (*m*); and although he may not be entitled to the possession of the deeds, yet he has a right to inspect them, and the vendor must produce them for that purpose (*n*).

But a purchaser is not entitled to attested copies of instruments on record.

This was decided in the case of *Campbell v. Campbell* (*o*), where the Master, in taxing costs incurred by the sale of considerable estates, disallowed the charges for attested copies of deeds and documents upon record; and upon exceptions to his report on that account coming on, the Master of the Rolls over-ruled them, and held that a purchaser was not entitled to such copies at the expense of the vendor.

In some cases, however, a purchaser can obtain attested copies even of instruments on record. For a purchaser is entitled to examine the abstract with the original title deeds, or with attested copies of them; and, therefore, if a vendor has not the instrument itself, and cannot

(*m*) *Dare v. Tucker*, 6 Ves. jun. 460; *Berry v. Young*, 2 Esp. Ca. 640, n.

(*n*) *Berry v. Young*, *ubi sup.*
(*o*) Rolls sittings after ———
Term, 1793, MS.

obtain it, he is bound to procure an attested copy of it, to enable the purchaser to ascertain that the abstract is correct; and when it is obtained, the purchaser is of course entitled to it on the completion of the purchase; unless, indeed, the vendor retains other estates holden under the same title.

In a case before Lord Rosslyn, where there was an agreement that the vendor should produce the original title-deeds, his Lordship construed it, not only as an engagement to produce the title-deeds, but as a negative stipulation, that he should not give attested copies. This was certainly presuming a great deal. Lord Eldon has since thought that the pressure of the stamp duties led to that decision (*p*); and, it is probable, that a similar case would now receive a different determination.

In a recent case, Lord Eldon compelled the vendor, at his own expense, to furnish attested copies, the purchaser having had no intimation that he could not have the deed. For, his Lordship said, if he had notice that he was not to have them, he would regulate his bidding accordingly; conceiving that he was to bear the expense of procuring copies (*q*). From this, it may be inferred, that notice that the purchaser cannot have the deeds is tantamount to a stipulation, that he shall not be furnished with attested copies at the seller's expense. The general practice of the Profession, founded on the decided cases, is, that the seller, in the absence of an express stipulation to the contrary, is bound, at his own expense, to furnish the purchaser with attested copies: and Lord Eldon does not appear to have intended to establish a new rule.

Where a purchaser cannot claim the title-deeds, it is of great importance to him to obtain attested copies of them. But attested copies are not of themselves sufficient secu-

(*p*) See 6 Ves. jun. 460.

(*q*) Boughton v. Jewell, 15 Ves. jun. 176.

rity to a purchaser,—they are indeed mere waste paper against strangers, and cannot be used upon an ejectment, unless, perhaps, as between the parties themselves. Therefore, in order to enable a purchaser to effectually manifest and defend his title and possession, he is also entitled, at the expense of the vendor, to a covenant to produce the deeds themselves, at the expense of the purchaser (*r*); which should, in most cases, be carried into effect by a separate deed. And where a vendor retains the deed by which the estate he is selling was conveyed to him, (which is mostly the case when it relates to other estates) it seems advisable for the purchaser to require a memorandum of his purchase to be indorsed on such deed.

And where the title-deeds cannot be delivered, assignees must, like any other vendor, give attested copies of them at the expense of the estate, but their covenant for the production of the deeds should be confined to the time of their continuance as assignees (*s*). If, however, the covenant is so confined, the purchaser should have some security that the person who shall ultimately become entitled to the custody of the deeds will covenant for their production. The proper course seems to be for the assignees covenant to be made determinable in case they shall procure the person to whom they shall deliver the deeds to enter into a similar covenant with the purchaser.

It may here be remarked, that although a purchaser of part of an estate has taken a covenant for the production of the deeds, yet, if they afterwards come into his possession by accident, no person can recover them from him who has not a better right to them than he has (*t*).

Supposing a purchaser to be entitled to the custody of

(*r*) *Berry v. Young*, 2 Esp. Ca. 640, n.

(*s*) *Per Lord Eldon, Ex parte Stuart*, 2 Rose, 215.

(*t*) *Yea v. Field*, 2 T. Rep. 708.

the deeds themselves, yet if any of them be lost, and the vendor can deliver over copies which would be admitted as evidence at law, the purchaser will be compelled to take the title (*u*). But where a deed essential to the title is in the hands of a third person who is entitled to retain it, and would be compelled to produce it to the purchaser, the Court will not compel the purchaser to take the title unless the deed is deposited for the benefit of all parties (*x*). The purchaser is not bound to rely upon the equitable right to compel the production, but is entitled to the deeds, or a valid covenant to produce them (*y*).

It frequently happens, that a person having a covenant for production of the title-deeds to his estate, sells only part of the estate, and retains his purchase-deed, and the covenant to produce the deeds; and in such cases I should conceive the practice to be for the vendor to enter into the usual covenant for production of the title-deeds in his possession, which of course would include the original covenant to produce the deeds. But it seems that Mr. Fearne thought (*z*) that a purchaser was, in cases of this nature, entitled to require the vendor to covenant for the production of the deeds to such an extent as the covenant in the vendor's possession entitled him to the production thereof, unless he could procure a new covenant for that purpose from his grantors to the new purchaser; but that such covenant from the vendor should not be enforced, in case he produce the original covenant to produce the deeds, when it should be required to defend the purchaser's title.

(*u*) *Harvey v. Philips*, 2 Atk. 541. See an opinion of Mr. Booth's 2 Ca. and Opin. 223. As to the cases in which the execution of an instrument will be presumed, see *Skipwith v. Shirley*, 11 Ves. jun. 64; *Ward v. Garnons*, 17 Ves.

jun. 134; and see *Holmes v. Ailsbie*, 1 Madd. 551.

(*x*) *Shore v. Collett*, Coop. 234.

(*y*) *Barclay v. Raine*, 1 Sim. & Stu. 449.

(*z*) *Posth.* 113.

It is not unusual to insert a proviso in a deed of covenant, to produce title-deeds, for determining the covenant, in case the vendor sell the part of the estate retained by him, and procure the person to whom the estate is sold, and the title-deeds are delivered, to enter into a similar covenant with the first purchaser, for production of the title-deeds.

SECTION IV.

Of Covenants for Title.

LET us now proceed to consider what covenants for title a purchaser is entitled to.

The covenants usually entered into by a vendor seised in fee, are, 1st, that he is seised in fee; 2dly, that he has power to convey; 3dly, for quiet enjoyment by the purchaser, his heirs and assigns; 4thly, that the estate is free from incumbrances; and lastly, for further assurance (*a*).

Where a vendor has only a power of appointment, the first covenant ought to be, that the power was well created, and is subsisting; and the other covenants should be similar to those entered into by a grantor seised in fee. In small purchases the first covenant is sometimes omitted, which may be safely done, for the first and second are synonymous covenants.

It sometimes happens, that a purchaser consents to take a defective title, relying for his security on the vendor's covenants. Mr. Butler remarks, that where this is the case, the agreement of the parties should be particularly mentioned, as it has been argued, that as the defect in question is known, it must be understood to have been

(*a*) See *post.* ch. 13.

the agreement of the purchaser to take the title subject to it, and that the covenants for the title should not extend to warrant it against this particular defect (*b*). And it may be further observed, that in cases of this nature, unless the objection to the title appear on the face of the conveyance, the agreement to indemnify against the defect, and the covenants to guard against it, should be entered into by a separate instrument.

With respect to the *persons* against whose acts a vendor is bound to covenant, it seems that,

1st. A vendor who actually purchased the estate himself, for money, or other valuable consideration, and obtained proper covenants for the title, is not bound to enter into covenants extending beyond his own acts (*c*). This, Mr. Fearne remarks (*d*), is a practice founded in reason, where the vendee obtains the full benefit of all the covenants in the conveyance to the vendor, to the same extent as his vendor has them, by obtaining the possession of the deeds containing those covenants. When the vendor has parted with his means of claim or remedy against his grantor for breach of his covenants, and transferred them to the purchaser, by delivery of the deeds, and such vendee comes into the vendor's place, in that respect, by the acquisition of such deeds, it would be unreasonable that the vendor should make himself liable for any such breach. He, by departing with the means of remedy or compensation, must be understood to have discharged himself from, and the vendee, by accepting those means, to have taken upon himself the peril or risk of such breach, and the duty of enforcing its remedy or compensation.

2dly. Mr. Fearne, however, thought, that where a ven-

(*b*) See Butler's n. (1) to Co. see two opins. in 3 Pow. Convey. Litt. 384 a. See also Savage v. 206, 210.

Whitbread, 3 Cha. Rep. 14.

(*d*) Posth. 110.

(*c*) See 2 Bos. & Pull. 22; and

dor retains the title-deeds, he is bound to enter into covenants extending to the acts of the persons against whose acts he is indemnified by the deeds in his possession (e): but he also thought these covenants should be qualified by the insertion of a covenant on the part of the purchaser; that in case any claim should be made under the vendor's covenants against the acts of the former owner, and he (the vendor) should produce the deeds, in order to enable the purchaser to avail himself of the covenants contained in them, then no advantage should be taken of the vendor's covenants.

This, however, is a distinction never attended to in practice: if a vendor is entitled to retain the deeds, he enters into the usual covenant for the production of them, but never enters into more extensive covenants for the title, on account of the retention of the deeds.

3dly. Where a vendor does not claim by purchase in the vulgar and confined acceptation of that word (f); that is, by way of bargain and sale for money, or some other valuable consideration, a purchaser is entitled to require covenants from such vendor, extending to the acts of the last purchaser. For instance, if I sell an estate which was devised to me, and the devisor's father purchased the estate, the covenants for title are extended to the acts of the father (g). And a person claiming under a voluntary conveyance is considered in the same light as a devisee. So a person whose estate is sold under an order of a court of equity, or by a trustee to whom he has conveyed it upon trust to sell, is bound to covenant for the title in the same manner as he must have done if he himself had sold the estate.

But although the *universal and settled practice* of con-

(e) See the Lord Buckhurst's case, 1 Rep. 1.

(g) See acc. two opins. in 3 Pow. Conv. 206, 210.

(f) See 2 Black. Comm. 241.

veyancers is, to extend covenants for the title to the acts of the last purchaser, yet the Court of Chancery appears to hold, that a person not claiming by purchase is only bound to covenant against his own acts, and those of the person immediately preceding him (*h*). The rule established by practice is undoubtedly the most reasonable, for every purchaser is certainly entitled to a regular chain of covenants for the title. No solid reason can be given why any line should be drawn, and the covenants should extend to the person only who immediately preceded the vendor; and, however the Court of Chancery may act upon this rule, the practice of the Profession has taken too deep a root to be easily extirpated.

4thly. Where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, &c. and the residue is given over, a purchaser is not entitled to any covenants for the title, because no line can well be drawn as to the *quantum* which would make a person liable to covenant; and therefore, if this rule were not settled, a person who only took 5*l.* might as well be required to covenant, as one who took a large sum (*i*).

The same rule applies *ex necessitate* where an estate is sold for similar purposes under an order of a court of equity. If a different rule prevailed, the consequence would be, that the estate could never be sold by decree, till the account was taken of all the debts; because, before that account was taken, it could not appear who were to join in the conveyance, what was the number, and in what proportions they were beneficially entitled: but it is the constant practice to sell the estate in the first instance; of course the title can be made only by the trustees for

(*h*) See 3 Atk. 267; 3 Ves. affirmed in *Dom. Proc.* 8 Bro. jun. 236; and see 14 Ves. 239. P. C. 145; and see *Lloyd v.*

(*i*) *Wakeman v. Duchess of Griffith*, Atk. 264.
Rutland, 3 Ves. jun. 233, 504,

sale, without calling in the parties who are presumptively beneficially interested (*x*).

In both these cases, therefore, the purchaser is only *entitled* to a covenant from the parties conveying, that they have done no act to incumber. But it is to be lamented, that in these instances also the rule of the Court of Chancery differs from the practice of the Profession; for it always has been, and still is, the practice of the Profession to make all the *cestuis que trust*, whose shares of the purchase money are in anywise considerable, join in covenants for the title, according to their respective interests.

The rule of equity on this subject may of course be altered by the agreement of the parties (*l*); and therefore, in all agreements for purchase of estates from devisees, &c. in trust to sell, the purchaser should stipulate, that such of the persons entitled to the purchase money as he may require, shall join in the usual covenants for the title. Where, however, the trust is to pay debts, or trifling legacies, which will exhaust the whole of the purchase money, it is obvious that such a stipulation could not be carried into effect, and it had therefore better be omitted.

It must, however, be remarked, that the case of *Wakeman v. Duchess of Rutland* is by no means an authority that *cestuis que trust* of money to be produced by the sale of estates devised to trustees to sell, cannot in any instance be required to covenant for the title. Where the money to arise by sale of the estate is absolutely given to two or more persons, they are substantially owners of the estate, and must accordingly covenant for the title.

So, even where the money is in the first place to be applied in payment of debts, yet if they are all paid previously to the sale, the *cestuis que trust* must, it is conceived, covenant for the title.

(*k*) See 3 Ves. jun. 505, 506.

(*l*) See 3 Ves. jun. 236.

Upon this case another observation occurs. Lord Rosslyn seemed to think it dangerous to make the *cestuis que trust* parties to the conveyance; he said, the prudence of the common clause, that the receipts of the trustees shall be a discharge to the purchaser, would be defeated, and the purchaser would take upon himself the knowledge of all the trusts of the will (*m*). If this be so, conveyancers are indeed reprehensible; but as the purchaser buys under the will, whether the *cestuis que trust* are or are not parties to the conveyance, he is equally affected with the knowledge of the trusts; and yet, as *cujus est dare ejus est disponere*, it cannot be supposed that equity would compel a purchaser to see to the application of the purchase money, when the testator himself has declared he shall not. In *Ewer v. Corbet* (*n*), it was holden, that notice to a purchaser of a bequest of a term did not signify, *as every person buying of an executor where he is named executor, necessarily must have such notice*. This resolution applies to the point in question, and seems to place it beyond controversy.

Lastly, in conveyances by the Crown, a purchaser is not entitled to any covenants for the title; and where an estate is sold by assignees of a bankrupt, the purchaser is only entitled to a covenant from the assignees, that they have not done any act to incumber the estate.

But a bankrupt is always made a party to the conveyance of his estate, to prevent the difficulty which the purchaser might otherwise be put to in maintaining and proving the title; and the bankrupt is generally made to enter into covenants for the title in the same manner as he would have done, had he sold the estate while solvent.

(*m*) See 3 Ves. jun. 235.

(*n*) 2 P. Wms. 148.

SECTION V.

Of searching for Incumbrances.

It now comes in order to consider in what cases incumbrances should be searched for.

I. There are few cases in which judgments should not be searched for on the part of a purchaser; and if there is any reason to suspect the vendor, it is absolutely necessary to search immediately before the conveyance is executed, lest any judgments may have been entered up during the treaty; although if any judgments should be entered up after the purchase money, being an adequate consideration, is actually paid, equity would relieve the purchaser against the judgments, notwithstanding that they were entered up previously to the execution of the conveyance; the vendor being, in equity, only a trustee for the purchaser, and a judgment being merely a general lien, and not a specific lien on the land: and this equity prevails, where the judgment creditor had or had not notice of the contract(o).

In a case where a reversioner in fee first executed a bond, with a warrant of attorney to enter up judgment, and then mortgaged to another in fee, and on the 1st of January 1810 contracted to sell the estate to a purchaser without notice, and on the 5th of February 1810 a judgment was entered up and docketed, on the 28th of November 1812 an elegit issued, and an inquisition taken thereon on the 20th of January 1813, of which notice was given to the purchaser on the 16th of April 1810, but on

(o) See Nels. Ch. Rep. 184; Ab. 118; and see Kennedy v. Finch v. Earl of Winchelsea, 1 P. Daly, 1 Scho. & Lef. 373; Prior Wms. 278; 10 Mod. 418; 11 Vin. v. Penpraze, 4 Price, 99.

the 15th of March 1810 the mortgagee in fee and the mortgagor had conveyed the estate in fee to the purchaser without notice, and a part of the purchase money was secured to the seller by a legal term of years, and which was unpaid when notice of the judgment was given, *and afterwards the purchaser paid off the mortgage, and took a surrender of the term* (I), upon a bill filed by the judgment creditor, the Vice-Chancellor held, that as the greater part of the purchase money was paid, and the rest secured by the term when the notice was given, the judgment creditor had no remedy in equity against the fee. The purchaser was then the mortgagor for the term. The notice therefore was nothing more than notice to the mortgagor that a person to whom he had granted a legal term, by way of mortgage, was indebted on judgment; but a judgment is, at law, no lien upon a legal term; and when the interest of the debtor is legal, a judgment is no lien in equity. Notwithstanding this judgment, the debtor could well assign his legal term at his pleasure. If there was no lien upon the term in the hands of the debtor, there could be no lien upon the term in the hands of his assignee (p).

It seems advisable to ask the vendor, or his attorney, whether there are any incumbrances which do not appear on the abstract; for if he answer in the negative, the search for judgments may be postponed until immediately before the execution of the conveyance; and if there are any judgments, and the purchase cannot be completed on that account, the purchaser can recover all his expenses from the vendor (q). It should seem, however, that the

(p) *Forth v. The Duke of Norfolk*, 4 Madd. 508. The case was heard upon appeal.

(q) *Richards v. Barton*, 1 Esp. Ca. 268; *vide supra*, ch. 4.

(I) This fact appears from the papers in the cause.

purchaser would equally be entitled to recover the expense of the conveyance, although he had not inquired after, or searched for incumbrances before it was prepared.

A purchaser who, at the time of his contract, is seised of the legal estate, as a mortgagee, need not search for judgments subsequently to the mortgage, for an equity of redemption is not within the clause of the statute of frauds, which will shortly come under our consideration ; and it is, therefore, not extendable (r)(I). And as the purchaser will, by the contract, acquire equal equity with the judgment creditor, and has already got the legal estate, his title cannot be impeached. Some gentlemen of eminence even hold, that notice of judgments entered up *subsequently to the mortgage* will not affect the purchaser ; but it is conceived, that if he purchase with notice, either express or implied, of any judgment, the legal estate will not protect him in equity against the judgment creditor. The judgment is a lien upon the estate in equity (s), and confers a right on the creditor to redeem a prior mortgage or other incumbrance (t). And by the first principles of equity, a purchaser, with notice of any incumbrance, is bound by it in the same manner as the person was of whom he purchased (u). And, indeed, it has been expressly decided, that a mortgagee, purchasing

(r) *Lyster v. Dolland*, 1 Ves. jun. 431 ; 3 Bro. C. C. 478 ; and see *Burdon v. Kennedy*, 3 Atk. 739 ; *Scott v. Scholey*, 8 East, 467 ; *Metcalf v. Scholey*, 2 New Rep. 461.

(s) *Churchill v. Grove*, Nels. Cha. Rep. 89 ; 1 Cha. Ca. 35.

(t) See 2 Cha. Rep. 180.

(u) See *Anon.* 2 Ventr. 361, No. 2.

(I) *Note.* An equity of redemption has been held to be assets under the statute of frauds, 2 Freem. 115, pl. 130 ; although the determination appears not to have been acted upon. It were much easier to maintain that an equity of redemption is extendable under the statute. — *Note*, the case of *Freeman v. Taylor*, 3 Keb. 307, was before the statute.

the equity of redemption, is bound by judgments of which he has notice, although they were entered up subsequently to the mortgage (*x*).

This doctrine prevailed before the statute of frauds, and has been the observed rule of equity ever since; and it is said, that previously to the statute of frauds, a judgment creditor was in like manner, and upon the same principles, relievable in equity against *a conveyance to trustees*. And by the tenth section of that statute it is enacted, that execution may be delivered upon any judgment, statute, or recognizance, of all such lands, &c. as any other person or persons shall be seised or possessed of in trust for him against whom execution is so sued, in the same manner as if he had been seised of such lands, &c. of such estate as they be seised of in trust for him *at the time of the execution sued*, and shall be held discharged of the incumbrances of the trustee. Upon the construction of this statute it hath been holden, that if a trustee has conveyed the lands before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands cannot be taken in execution (*y*). Now it is clear, that where the fee is in trustees, the purchaser would not be bound by any judgment, upon which no writ of execution had been sued, and of which he had not notice. But here, as in the preceding case, the purchaser, it is contended in practice, cannot be advised to rely on the legal estate in the trustees, where he has notice of any subsequent judgments. Mr. Powell (*z*), however, entertained a contrary opinion. After showing that trust estates can only be taken in execution by virtue of the statute of

(*x*) *Greswold v. Marsham*, 2 Cha. Ca. 170; *Crisp v. Heath*, 7 Vin. Abr. 52, (E.) pl. 2.

(*y*) *Hunt v. Coles*, Com. 226.

See *Higgins v. The York Buildings Company*, 2 Atk. 107; *Harris v. Pugh*, 4 Bingh. 335.

(*z*) 2 Mort. 4th edit. p. 608.

frauds, he contends, that where the legal estate is in a trustee, *notice* to a purchaser of judgments is immaterial, because the lands are not *liable* at law; and, as *equity follows the law*, no relief would be granted against the purchaser, through the medium of a court of equity.

If the case of *Hunt v. Coles* be an authority, it must be acknowledged that trust-estates cannot be affected by any execution sued upon a judgment after the trustee has conveyed away the lands. But admitting, that before the statute of frauds, an incumbrancer might be relieved against a conveyance to trustees, it should seem to follow, that the same equity must still be administered. It were difficult to successfully contend, that the statute has concluded the equitable relief. The registering acts expressly enact, that a purchaser shall not be bound by instruments, &c. unless they are registered, notwithstanding which equity will fasten on the conscience of a purchaser who bought with notice of any unregistered incumbrance; and there is surely greater reason to hold, that the jurisdiction of equity shall not be barred by a statute which merely gives a partial remedy at law without interfering with the equitable rights of the parties.

The difficulty in the way of the relief would be, that no case can be found, after the most diligent search, in which a judgment creditor has been relieved against a conveyance to trustees, where a purchaser had subsequently acquired the legal estate. The author formerly thought that equity would relieve against the purchaser, if he bought with notice; but his confidence in that opinion has been shaken by the want of authority in support of it. Nothing but a judicial determination can set the doubt on this point at rest.

The statute only extends to clear and simple trusts for the benefit of the debtor. Therefore a trustee of a term

of years for securing an annuity, and subject thereto for the grantor, is not a trustee within the statute (a).

Where, however, an estate is conveyed to trustees upon trust to sell, and pay debts, &c. and to pay the surplus of the monies to arise by sale to the grantor, and the receipts of the trustees are made sufficient discharges to the purchasers; the better opinion is, that the purchaser is not bound by any subsequent judgments of which he has even express notice. Great difference of opinion has prevailed in the Profession on this point. Those who hold that a purchaser is bound by such judgments, rightly compare the interest of the grantor in the estate to an equity of redemption. But as such an interest is not extendible, the debt of the judgment creditor can only, it should seem, affect the surplus monies in the hands of the trustees, and is not a lien on the estate itself. When the receipts of the trustees are once made a discharge to the purchaser, there surely is not any equity in a subsequent incumbrancer to require the purchaser to see to the application of any part of the money. The creditor stands, as to his debt, in the place of his debtor, and consequently is entitled to have his debt discharged out of the surplus monies in the hands of the trustees; but he cannot, it is conceived, claim a higher equity; the contrary rule would be productive of infinite inconvenience.

As a mortgagee, seised or possessed of a legal estate, need not search for judgments; so a purchaser, who obtains an assignment of a legal subsisting term of years in trust to attend the inheritance, may dispense with a search for judgments, &c. if he be assured that notice of any incumbrance cannot be proved on him or any of his agents. But as notice may be inferred from very slight circumstances, a purchaser cannot be advised in

(a) *Doe v. Greenhill*, 4 Barn. & Ald. 684.

any case, or under any circumstances, to dispense with the usual searches. And even where he does rely on a term of years, yet if it be recently created, incumbrances should be searched for previously to the creation of the term.

It is, I believe, usual to search for judgments against a vendor, only from the time he purchased the estate; but this practice is not correct, because judgments bind after-purchased lands, and will consequently affect such lands even in the hands of a purchaser (*b*).

Judgments do not, it seems, bind leasehold estates till writs of execution are taken out upon them, and delivered to the sheriff (*c*). And yet, upon purchase of a leasehold estate, judgments must be searched for; because the sheriff will not permit his office to be searched for any writ of execution which may have been delivered there, lest the purposes of the writ should be defeated by the party against whom it is issued absconding, or removing his goods. Therefore, although the judgment will not of itself bind the leasehold estate, yet the purchaser cannot safely complete his contract, where he discovers a judgment, because he cannot be satisfied that an execution issued upon it has not been lodged with the sheriff. When we consider how many valuable leasehold estates are daily brought into the market, we shall perhaps think that the Legislature would do well to enact, that writs of execution *intended to bind leasehold estates* shall be docketed in like manner as judgments, and that where the estate lies in a register county, they shall be registered.

(*b*) See Sir John de Moleyn's case, 30 E. 324 a; 1 Ro. Abr. 892, pl. 14, 16; 42 E. 3, 11 a; 42 Ass. pl. 17; 2 H. 4, 8 b. pl. 42; 14 a, pl. 5; 2 Ro. Abr. 472, (P.) pl. 3; Shep. Prac Couns. 305;

Hickford v. Machin, Winch, 84, per Jones, J.; and Brace v. Duchess of Marlborough, in 2d Resol. 2 P. Wms. 492.

(*c*) *Vide post.* ch. 16.

Where only an equity of redemption of a term is purchased, the purchaser will not be affected by even an execution lodged, of which he had not notice, for such an interest is not extendible under the statute of frauds, and certainly the mere delivery of the writ to the sheriff would not be implied notice to a purchaser (*d*).

These observations, respecting judgments, must not be closed without observing, that if a person purchase part of an estate subject to a judgment, and the residue of the estate remain in the hands of the conusor, or descend to his heir, and execution is sued only against the original debtor or his heir, he shall not have contribution against the purchaser, and the consideration of the purchase is not material in these cases. But if execution be sued against the purchaser only, he shall have contribution against the persons seised of the residue of the estate, whether they acquired it by descent or purchase (*e*).

Sir Edward Coke observes (*f*), that when it is said, that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him any thing by way of contribution; but it ought to be intended, that the party who is only extended for the whole, may, by *audita querela*, or *scire facias*, as the case requires, defeat the execution, and compel the conusor to sue execution of the whole land; so, in this manner, every one shall be contributory, *hoc est*, the land of every terre-tenant shall be equally extended.

II. To resume the consideration of the cases in which incumbrances should be searched for :

(*d*) See 1 Ves. jun. 431; 3 Atk. 739.

11 b. See the distinctions taken in *Blakeston v. Martyn*, 1 Jo. 90.

(*e*) Sir Wm. Herbert's case, 3 Co.

(*f*) 3 Co. 14 b.

If the estate lie in a register county (I), the registrar's office should be searched, for the purpose of ascertaining not only that the estate is free from incumbrances, but also, that the title-deeds are duly registered ;—the estate may be lost by neglecting to do so. And if it appear that any deed has not been duly registered, the vendor must procure it to be registered at his own expense, previously to the completion of the contract ; although, indeed, it sometimes happens that an instrument not being registered, prevents an objection being made to the title. To give an instance of this, let us suppose a man to have mortgaged his estate, and paid off the money, but to have neglected to take a re-conveyance. Now, in this case, if the mortgage was not registered, the purchaser need not insist upon its being registered, and require a re-conveyance from the mortgagee ; because, as the deed was not registered, the mortgagee did not acquire the legal estate, or if he did would cease to have it by the registry of the conveyance to the purchaser ; and, being paid off, he has of course no equity. So, where a partial interest in an estate is devised to the heir at law, with a power of leasing, and he grant a lease not authorized by his power, the lease may, in some cases, be sustained both at law and in equity, in case the will was not registered according to the act. This, however, is a mode of making a title to which necessity only should compel us to resort.

It is very seldom that wills are registered ; but a purchaser from a devisee should not complete his contract till the will is duly registered ; for should any person purchase of the heir at law *bonâ fide*, and without notice of the will, and register his conveyance before the registry

(I) For some observations on the registry acts, see *infra*, ch. 16.

of the will, he would be preferred to the purchaser from the devisee (g).

But if the vendor be both heir at law and devisee, the non-registry of the will is immaterial ; for if he sell to any subsequent purchaser, it must be either in the character of heir at law, or in the character of devisee. If he sell in this character, the second purchaser must have notice of the will ; if he contract in that, the first purchaser has already procured the legal estate.

So it seems clear, that if the vendor claim a leasehold estate, either as executor or legatee, the purchaser need not insist upon the testator's will being registered, because no subsequent purchaser can procure a title without notice of the will ; and it may be remarked, that letters of administration are never registered, and they seem to stand upon the same principle as wills of leasehold estates.

If a purchaser be already seised of the legal estate, as if he be mortgagee in fee, and has contracted for the equity of redemption, it is not actually necessary to search the register if he be assured that notice cannot be proved either on himself, or on any one concerned for him ; because the mere registration of deeds, as we shall hereafter see, is not notice to a purchaser seised of the legal estate previously to the purchase, and he will, therefore, be entitled to hold against any *puisne* incumbrance of which he had not notice.

Where the estate lies in the county of Middlesex, judgments need only be searched for at the registrar's office, as judgments bind estates in that county only from the time they are memorialized ; but this is not the case in the county of York ; for in the North Riding, any judgment registered within twenty days after the acknowledgment or signing of it, is available in the same manner as if t

(g) See *Jolland v. Stainbridge*, 3 Ves. jun. 478.

had been registered on the day it was acknowledged or signed (*h*); and in the East and West Ridings, and in Kingston-upon-Hull, thirty days are allowed for the registering of judgments (*i*). Therefore, where the estate lies in York, or Kingston-upon-Hull, recent judgments must be searched for in the proper courts.

It has already been observed, that judgments do not bind leasehold estates till delivery of a writ of execution to the sheriff. Writs of execution upon judgments intended to affect leasehold estates in a register county, were formerly never registered (*k*). From the present practice of registering writs of execution, it may perhaps be concluded that they ought to be registered; but the registry of them seems *casus omissus* out of the statutes for registry; and therefore, upon the purchase of a leasehold estate in a register county, not only the register, but also the proper courts, should be searched.

The register ought to be searched immediately before the execution of the conveyance, for the same reason that the search for judgments should be delayed till the last moment.

And lastly, since grants of annuities have become so prevalent, and can be searched for, it is the duty of the purchaser's solicitor to search for annuities. In a register county they need only be searched for at the registrar's office.

It may be useful to observe, that if a purchaser is damaged by his solicitor neglecting to search for incumbrances, it is clear that he may recover at law against the solicitor, for any loss occasioned by his negligence (*l*).

(*h*) 8 Geo. II. c. 6, s. 33.

(*i*) 5 Anne, c. 18, s. 11; 6 Anne, c. 35, s. 28.

(*k*) *Vide infra*, ch. 16.

(*l*) Brooks v. Day, 2 Dick. 572; Forshall v. Coles, 7 Vin. Abr. 54,

pl. 6, MS.; and Appendix, No. 19; Green v. Jackson, Peake's Ca. 236; Ireson v. Pearman, 5 Dowl. & Ry. 687. See Baikie v. Chandless, 3 Camp. Ca. 17.

But an attorney's negligence cannot, perhaps, in any case, be set up as a defence to an action by him for the business done, although it should seem that if there is a cross-action by the client against the attorney, the Court will, upon application, stay the execution in the action by the attorney pending the other (*m*).

So if the chief clerk, whose duty it is to enter up and docket judgments, neglect to do so, by which a purchaser, who has made the proper searches, sustains any loss, he, the purchaser, has a remedy against the clerk by an action on the case (*n*). And any person who is damnified by the neglect of the registrar of either of the registering counties, may bring an action against him, in which he will recover treble damages and costs of suit, by virtue of the registering acts (I).

SECTION VI.

Of Relief from Incumbrances.

HAVING considered in what instances incumbrances should be searched for, let us now inquire, 1st, In what cases a purchaser may detain the purchase money, if incumbrances are discovered previously to the payment of it: and 2dly, To what relief he is entitled, if evicted after the money is actually paid; and these inquiries will involve the consideration of the cases in which a purchaser will be relieved in respect of defects in the title to the estate.

(*m*) *Templer v. M'Lachlan*, 2 New Rep. 136.

(*n*) *Douglas v. Yallop*, 2 Burr. 722.

(I) By the registering acts for Scotland, the remedy is extended against the heirs of the clerk, although no action shall have been commenced in the clerk's life-time. 1 Ersk. Inst. B. II. T. III. s. 42.

1. First then, 1. Where an incumbrance is discovered previously to the execution of the conveyance, and payment of the purchase money, the vendor must discharge it, whether he has or has not agreed to covenant against incumbrances, before he can compel payment of the purchase money (*o*).

2. But if a purchaser, before executing the articles, has notice of an incumbrance *which is contingent*, and it is by the articles agreed that the vendor shall covenant against incumbrances, the purchaser has entered into them with his eyes open, has chosen his own remedy, and equity will not assist him (*p*); and he cannot, therefore, detain any part of the purchase money.

II. 1. Although the purchaser has paid the money, yet if he is evicted before any conveyance is prepared and executed, or before the conveyance is executed by *all* the necessary parties, he may recover the purchase money in an action for money had and received, although the intended covenants do not extend to the title under which the estate was recovered, and he may have taken possession of the estate (*q*) (I).

2. But if the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted

(*o*) Anon. 2 Freem. 106; Vane v. Lord Barnard, Gilb. Eq. Rep. 6; Serj. Maynard's case, 2 Freem. 1; 3 Swanst. 651; and see 1 Ves. 88; 2 Ves. 394; 2 Ves. jun. 441; and 4 Bro. C. C. 394.

(*p*) Vane v. Lord Barnard, *ubi sup.*

(*q*) Cripps v. Reade, 6 Term

Rep. 606; Matthews v. Hollings, Woodfall's Law Land. 35, cited; Johnson v. Johnson, 3 Bos. & Pull. 162; and see Awbry v. Ken, 1 Vern. 472; and see Brig's case, Palm. 364; Simmons v. Hunt, 1 Marsh. 155; Jones v. Ryde, 5 Taunt. 488.

(I) In Robinson v. Anderton, Peake's Ca. 94, Lord Kenyon permitted a purchaser of *fixtures* in a house which were scheduled in the original lease, and belonged to the landlord, to recover the purchase money, although the person who sold them was an under tenant, *and had himself ignorantly paid for the fixtures.*

by a title to which the covenants do not extend, he cannot recover the purchase money either at law (*r*) or in equity (*s*).

This was Serjeant Maynard's case (*t*). The plaintiff exhibited his bill to be repaid 600*l*. Sir Edward Moseley devised certain Leicestershire lands unto his wife, (afterwards Lady North,) for life, remainder to the first, second, third, fourth, fifth, and tenth son of his sister Maynard, (wife of Joseph Maynard, the Serjeant's eldest son,) in tail, remainder to Nicholas Moseley, the father of Oswald, for life, remainder to Oswald Moseley in tail, with other remainders over, and died in October 1665. The Serjeant goes down into Lancashire, peruses all the writings, (makes agreements with Mr. Edward Moseley, on behalf of his son, not to contest the will, and to discharge a lease for eleven years, and thereupon hath 10,000*l*. debt secured by judgment, all which agreements his son flies off from, and tries the will, &c.) and perceiving that if the will stood, (as he believed it would do, having examined all the witnesses upon the place,) then it would be in the power of my Lady North, by joining with Nicholas and Oswald, to bar all the contingent remainders to his daughter's children, who at that time had none, and so the Leicestershire lands, worth 600*l*. per annum, would be lost: In December 1665 comes to an agreement with Nicholas and Oswald to buy their remainder or possibility in the Leicestershire lands for 600*l*., and pays it down; and the manner of the further assurance was to be thus: Nicholas and Oswald were to procure the Lady North (without whom it could not be done) to join with them in a common recovery before the

(*r*) See *Cripps v. Reade*; *Johnson v. Johnson*; and *Bree v. Holbech*, Dougl. 654.

2 Freem. 1; 3 Swanst. 651; Anon. 2 Freem. 106.

(*t*) 3 Swanst. 651.

(*s*) Serjeant Maynard's case,

end of three years ; and to secure this, Nicholas and Oswald gave a bond of 1,200*l.* to the Serjeant, conditioned, that if no recovery be suffered within three years, whereby the estates of Nicholas and Oswald may be sufficiently barred, then upon the re-conveyance of the premises to repay 600*l.* After this, Mrs. Ann Moseley sets up a title to the Leicestershire lands by virtue of a will of Sir Edward Moseley's father, found in loose sheets among the evidences, and supposed to be suppressed by the son, upon which title she exhibited a bill in this Court, and obtained a decree for the Leicestershire estate, notwithstanding which eviction the recovery was suffered within the three years by the Lady North and Nicholas and Oswald Moseley in due form ; and now the Serjeant demanded the 600*l.* in equity, because no re-conveyance of the premises could be made within three years, in regard the title was evicted, and the recovery did him no good. But Lord Nottingham dismissed the bill.

Lord Nottingham, in delivering judgment, said that the cause which was heard before, and dismissed, came now to be re-heard at the plaintiff's importunity, who pressed earnestly for a decree, but he continued of the same opinion in substance, and caused the reasons of that opinion to be specially entered by the registrar in manner following : " His Lordship declared, that as this Court suffers no man to over-reach another, so it helps no man who hath over-reached himself without any practice or contrivance of his adversary ; that it was most plain in this case there was no fraud nor concealment in the defendants at the time of the sale of their remainders, but all things were more open, and better known to the plaintiff than they were to the defendants, for the plaintiff had been upon the place and perused the evidence of the

family, and the defendants did not solicit the plaintiff to buy, but the plaintiff importuned the defendants to sell their remainders, and had reason so to do, for otherwise, as things then appeared on all hands, the defendants, with the concurrence of the Lady North, might have disinherited the issue male to be begotten on Mrs. Maynard of all the Leicestershire estate, worth 600*l.* per annum. Accordingly the plaintiff covenants with the defendants for their title for 600*l.*, which was much short of what it was then worth in all appearance, and the plaintiff draws his own assurance, and pens the defeasance of that bond, upon which he now sues in equity to have back the 600*l.* and interest, by which very bill the plaintiff admits that the defendants can no way be charged with the bond at law. It remains, ergo, to be considered what grounds there are to charge them in equity; for the defendants, who made no corrupt or fraudulent agreement at first, insist upon it that they have literally performed that agreement which they made, and for which they took their money; ergo, that the defendants should now be forced in equity to pay back their money and interest, and be put into the same plight in effect as they would have been if they had broken their agreement, seems hard; and the more, because all the reasons which are used to enforce such a decree do arise either from the eviction by Mrs. Ann Moseley, or from the supposed defective and illusory performance of the agreement by the defendants, or from some other circumstance in the case which hath disabled the plaintiff to sue his bond at law; and yet no arguments are drawn from any of these heads strong enough to support this bill. For, first, as to the eviction; although after the bond and the agreements the lands were evicted by Mrs. Ann Moseley, so that the defendants may now seem to retain the 600*l.*

for nothing, yet he that purchases lands with any other covenants or warranties against prior titles, as here, where the defendants sold only their own title, if the land be afterwards evicted by an eigne title, can never exhibit a bill in equity to have his purchase money again, upon that account possibly there may be equity to stop the payment of such purchase money as is behind, but never to recover what is paid ; for the Chancery mends no man's bargain, though it sometimes mends his assurance ; and it cannot be truly said that the defendants keep the money for nothing, since they have done all which was agreed to be done for it ; but if the plaintiff had bought that which falls out to be worth nothing, he can complain of none but himself."

After discussing the manner of the defendants performance of their agreement, the reasons of Lord Nottingham proceed thus : " For whereas the plaintiff supposes himself disabled to go to law, in regard the defendants are not obliged to repay without a re-conveyance, which cannot now be made in regard of Ann Moseley's eviction, his Lordship conceived this to be only a pretence ; for whether the title be good or bad, the plaintiff may still proceed to re-convey what was pre-conveyed, and then assign the breach in not suffering a recovery if he think good. And the plaintiff might as reasonably have prayed a decree heretofore that the defendants might not perform their agreement, as pray a decree now that they may be never the better for it, if they have performed it. Wherefore, upon the whole matter, though, if the defendants had been plaintiffs for the money, his Lordship would hardly have decreed for them ; as they were defendants, and in possession of money upon an agreement executed ; his Lordship saw no cause to decree against them.

But yet he did not absolutely dismiss, but decreed,

1st, if plaintiff go to law, defendants to admit a re-conveyance, and not to take advantage of eviction here ; 2d, if plaintiff release defendants, to make further assurance.

So where (*t*) *A* bought an estate, to one moiety of which there was a clear defect of title, which his counsel had overlooked, and he was afterwards evicted ; he filed a bill asserting his claim to be repaid a moiety of the purchase money, although the covenants for title did not extend to the eviction, but the bill was dismissed (I).

The facts of this case were as follow : William Davy devised the estate in question to Sir Robert Ladbroke and Lyde Brown, as tenants in common, in fee ; and gave all the residue of his real estate to his brother William Pate in fee. Sir Robert Ladbroke died in the testator's lifetime. Robert Pate, as devisee of William Pate, the residuary devisee, conceived himself to be entitled to the moiety devised to Sir Robert Ladbroke, which became lapsed by his death, in the testator's life-time (II) ; and

(*t*) See 3 Ves. jun. 235 ; and see 2 Bos. & Pull. 23.

(I). In the second vol. of Coll. of Decis. p. 517, 518, a case to the same effect is reported.—Lands which were sold with the warrandice from fact and deed allenary, being evicted, but not through default of the disposer, the purchaser brought an action, not upon the warrandice, which was not incurred, but upon this ground of equity, that if he has lost the land, he ought at least to have repetition of the price. It was answered, that when one sells with warrandice from fact and deed, the intention is not to sell the subject absolutely, which would be the same as selling it with absolute warrandice, but only to sell it so as the seller himself has it, that is to sell what title and interest he has in the subject : the purchaser takes upon himself all other hazards ; and, therefore, if eviction happen otherwise than through the fact and deed in the disposer, he bears the loss. The Lords assoilzed. *Craig v. Hopkins*.

(II) The mistake arose from the case of lapse being considered the same in regard to real and personal estate : in the case of personal estate lapsed legacies fall into the residue ; but where a real estate lapses, it descends to the heir at law, and does not pass to the residuary devisee.

accordingly Robert Pate joined with the persons entitled to the moiety devised to Lyde Brown, in selling the estate to one Urmston. *The conveyance recited the will of William Davy, and all the subsequent instruments*, and a covenant was inserted for the title, notwithstanding any act done by Robert Pate, or his ancestors, or any person claiming under him or them. The purchaser finding Robert Pate had no title to the moiety over which he assumed a power of disposition, but that it had descended to the heir at law of William Davy, filed his bill, praying that the purchase money might be restored to him. Robert Pate, the vendor, demurred to the bill for want of equity, and the demurrer was allowed (*u*).

So, if a purchaser neglect to look into the title, it will be considered as his own folly, and he can have no relief. It has even been laid down, that if one sells another's estate without covenant or warranty for the enjoyment, it is at the peril of him who buys, because the thing being in the realty, he might have looked into the title, and there is no reason he should have an action by the law where he did not provide for himself (*x*). But it may here be remarked, that by the 32 H. 8, c. 9, no person must either buy or sell any pretended title unless the seller or the persons from whom he claims have been in possession of the estate, or of the reversion thereof, or taken the rents thereof, for a year before the sale, unless the purchaser is in lawful possession, in which case he may buy in any pretended right; and he will not in any case be affected, unless he bought with notice (*y*).

(*u*) *Urmston v. Pate*, Chan. 1st Nov. 1794, cited in 1 Trea. Eq. 364, n. and stated in 4 Cruise's Digest, 90, s. 64.

(*x*) *Roswell v. Vaughan*, 2 Cro. 196; *Lysney v. Selby*, 2 Lord Raym. 1118; *Goodtitle v. Mor-*

gan, 1 Term Rep. 755; and see *Anon.* 2 Freem. 106; and see and consider *Hitchcock v. Giddings*, 4 Price, 135.

(*y*) See 4 Rep. 26 a; Bac. Abr. tit. Maintenance, (E.)

In a late case the statute was pleaded with effect (z). In a recent instance this statute was actually pleaded to a bill for a specific performance, on the ground that the plaintiff himself was only entitled under an agreement for purchase of the estate; but there was no foundation whatever for this defence. It is perfectly clear that the statute does not apply to such a case. This sale is not of a pretended right or title, but of the estate in fee-simple in possession, subject certainly to the decision of a court of equity upon the right to a specific performance. There were lately similar cases in court, and one particularly of great magnitude, in which the sub-purchaser would have been happy to avail himself of any objection to get rid of the contract, but it never before occurred to any one to plead the statute. It might with equal force be argued, that a purchaser under an agreement has not a devisable interest, for it is settled, that a mere right of entry is not devisable; and this, it may be said, is "a mere pretended right or title." The clear doctrine is, that the purchaser, from the time of the contract, is in equity the owner of the estate, and may devise, sell and dispose of it in the same manner as if the fee were actually conveyed to him, although if equity ultimately refuse a specific performance, the devise, sale or other disposition necessarily falls to the ground. In a late case Lord Eldon reprobated the doctrine. His Lordship held clearly, that the sale of an equitable estate under a contract was binding. It was every day's practice. Upon a sale of an interest under a contract, the seller becomes a trustee for the second purchaser, and the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit. The Court not only considers it not unlawful, but compels him

(z) *Hitchins v. Lander*, Coop. 34.

to permit his name to be used for the benefit of the second purchaser (*a*). This puts the point at rest.

It is not champerty in an agreement to enable the *bonâ fide* purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase (*b*).

“Where a purchaser has taken a defective title, and cannot recover against his immediate vendor, his only remedy is to have recourse to the covenants of the earlier vendors, many of which are inherent to the lands, and to some of which, as the covenant for quiet enjoyment, there is no objection, on account of their antiquity, where the breach is recent (*c*).”

3. It seems, that if the conveyance be actually executed, the purchaser can obtain no relief, although the money be only secured.

In an early case, however (*d*), where *A* had sold to *B*, with covenants only against *A*, and all claiming by, from, or under him, *B* secured the purchase money; but before payment, the land was evicted by a title paramount to *A*'s, and Lord Chancellor Finch relieved from the payment of the purchase money.

The case, it seems, was not taken by the reporter himself, and he adds the following notes, or queries to it:

First. If declaration at the time of the purchase treated on, that there was an agreement to extend against all incumbrances, not only special, it could not have been admitted.

Secondly. The affirmative covenant is negative to what is not affirmed, and all one as if expressly declared that the vendor was not to warrant but against himself, and the vendee to pay, because absolute without condition.

(*a*) *Wood v. Griffith*, 12th Feb. 1818, MS.

(*b*) *Williams v. Prothero*, 5 Bing. 309.

(*c*) *Butler's n.* (1) to *Co. Litt.* 384 a.

(*d*) *Apon.* 2 *Cha. Ca.* 19; and see *Fonbl. n.* (*g*) to 1 *Trea. Eq.* 361, 2d edition.

Thirdly. *Quære*, If this may not be made use of to a general inconvenience, if the vendee, having all the writings, and purchase, is weary of the bargain, or in other respects sets up a title to a stranger by collusion?

Nota. In many cases it may be easily done, &c.

These remarks are unanswerable; and if the doctrine in this case were law, the consequences would be of a very serious nature; for what vendor would permit part of the purchase-money to remain on mortgage of the estate, if he were liable to lose it, supposing the estate to be recovered by a person against whose acts he had not covenanted? Indeed, this point is so very differently considered in practice, that where part of the purchase-money is permitted to remain on mortgage, although the covenants from the vendor be limited, the vendee invariably enters into general unlimited covenants, in the same manner as he would have done in the case of an independent mortgage.

In a case (*e*) where an estate was sold before a Master under a decree, and the purchaser under the usual order had paid his purchase-money into the Bank, but it was not to be paid out without notice to him, and he took possession, and approved of the title, and the conveyance to him was executed by all necessary parties; afterwards, but before the money was paid out of the Bank, the tenants were served with a writ of right, at the suit of an adverse claimant; it was held that the money must be applied under the decree. The Court having given the purchaser possession of the estate which he had purchased, and a conveyance under a title which he himself had previously approved, had done all it could for the purchaser, who could not afterwards object to the application of the purchase money.

(*e*) *Thomas v. Powell*, 2 Cox, 394.

4thly. Although the purchase money has been paid, and the conveyance is executed by all the parties, yet if the defect do not appear on the face of the title-deeds, and the vendor was aware of the defect, and concealed it from the purchaser, or suppressed the instrument by which the incumbrance was created, or on the face of which it appeared, he is in every such case guilty of a fraud (*f*), and the purchaser may either bring an action on the case, or file his bill in equity for relief.

But, as Mr. Butler remarks, a judgment obtained after the death of the seller, in an action of this nature, can only charge his property as a simple contract debt, and will not, therefore, except under very particular circumstances, charge his real assets. A bill in Chancery, in most cases, will be found a better remedy: it will lead to a better discovery of the concealment, and the circumstances attending it, and may in some cases enable the Court to create a trust in favour of the injured purchaser (*g*).

Where a bill is filed against the vendor, and the Court cannot satisfy itself of the fact, an issue will be directed to try whether the vendor did know of the incumbrance (*h*).

In a late case, where the sellers knew of a defect in the title to a part of the estate, which was material to the enjoyment of the rest, and did not disclose the fact to the purchaser, and it could not be collected from the abstract, the purchaser, although he was not evicted, was relieved against the purchase in equity. The sellers were decreed to repay the purchase-money, with costs, and likewise all expenses which the purchaser had been put to relative to the sale, together with an allowance for any money he

(*f*) See *Harding v. Nelthrope*, Nels. Cha. Rep. 118; and *Bree v. Holbech*, Dougl. 654, 2d edit.; and see 2 Freem. 2.

(*g*) See Butler's n. (1) to Co. Litt. 34 a.

(*h*) *Harding v. Nelthrope*, *ubi sup.*

laid out in repairs during the time he was in possession (*i*). This is a case of the first impression. But after the contract is executed by a conveyance and payment of the purchase money, a bill cannot be filed merely for compensation (*k*).

Although the vendor has fraudulently concealed an incumbrance, yet the purchaser has no lien on the purchase-money after it is appropriated by the vendor.

Thus, in the case of *Cator v. Earl of Pembroke* (*l*), Lord Bolingbroke was tenant for life of a settled estate, with a power to sell and lay out the money arising by sale in other lands; and in the mean time to invest the same in the funds. Lord Bolingbroke granted life-annuities out of the estate, and then he and the trustees of the settlement sold the estate to Cator, who was ignorant of the annuities, and Lord B. covenanted that Cator should enjoy free from incumbrances. The purchase-money was invested in the funds in the names of the trustees, and Lord Bolingbroke granted annuities to Boldero the banker, to the extent of the dividends; and the trustees, at the request of Lord Bolingbroke, gave Boldero an irrevocable power of attorney to receive the dividends. Cator being evicted by the grantee of the annuities charged on the estate, filed his bill, insisting that he had a lien on the purchase-money invested in the funds, and was entitled to the dividends in exclusion of Boldero. The cause was first heard before the Lords Commissioners Loughborough, Ashurst and Hotham, who thought that Cator had a lien on the dividends, but that Boldero had a preferable equity, and therefore dismissed the bill. The cause was

(*i*) *Edwards v. M'Leay*, Coop. 308; affirmed by Lord Eldon on appeal, 11 July 1818, with a reservation of the question as to repairs, MS.; S. C. 2 Swanst. 287.

(*k*) *Lenham v. May*, 13 Price, 749.

(*l*) *Cator v. Earl of Pembroke*, 1 Bro. C. C. 301; and see and consider 12 Ves. jun. 356, 377.

reheard before Lord Thurlow (*m*), who affirmed the decree, and was moreover of opinion, that Cator could not follow the money when deposited with the trustees, but that having taken a covenant for quiet enjoyment and a good title, his remedy was that way.

Where a purchaser pays part of the purchase-money generally to a creditor of the vendor, by judgment, or other security affecting the land, and also by bond, or other security, which does not affect the land, it will be considered as a payment in satisfaction of the judgment, or other incumbrance which charges the estate (*n*).

It may here be observed, that if a seller is bound to relieve the estate sold from incumbrances, and the purchaser buys them up, he ought not to charge more than he paid, as that is the amount of the damage which he sustains by the breach of the covenant to pay off the incumbrances (*o*).

(*m*) 2 Bro. C. C. 282.

24; Peters v. Anderson, 5 Taunt.

(*n*) Brett v. Marsh, 1 Vern. 468. 596.

See Hayward v. Lomax, 1 Vern.

(*o*) 2 Dow. 296.



CHAPTER X.

OF INTEREST AND COSTS.

SECTION I.

Of Interest.

L. EQUITY considers that which is agreed to be done, as actually performed ; and a purchaser is therefore entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate (*a*) : and as, from that time, the money belongs to the vendor, the purchaser will be compelled to pay interest for it, if it be not paid at the day (*b*).

The same rule applies to a sale of a reversion—interest must be paid from the time fixed upon for payment of the purchase-money, because the wearing of the lives is equivalent to taking the profits (*c*).

This is so plain a rule, that no disputes could ever arise on it, if the purchase-money were not frequently lying dead ; in which case it becomes a question, whether the loss of interest shall fall on the vendor or purchaser.

If the delay in completing the contract be attributable to the purchaser, he will be obliged to pay interest on

(*a*) See 6 Ves. jun. 143, 352.

(*c*) Davy v. Barber, 2 Atk. 490 ;

(*b*) See Sir James Lowther v. the Countess Dowager of Andover, 1 Bro. C. C. 396 ; and see 6 Ves. jun. 352.

and see Owen v. Davis, 1 Ves. 82 ; 3 Atk. 637 ; *vide post* as to the sale of a reversion before a Master.

the purchase-money from the time the contract ought to have been carried into effect, although the purchase-money has been lying ready, and without interest being made of it (*d*).

But if the delay be occasioned by the default of the vendor, and the purchase-money has lain dead, the purchaser will not be obliged to pay interest (*e*). The purchaser must, however, in general give notice to the vendor that the money is lying dead (*f*); for otherwise there is no equality: the one knows the estate is producing interest, the other does not know that the money does not produce interest (*g*). Wherever, therefore, a purchaser is delayed as to the title, and means to insist upon this, he ought to apprise the other party that he is making no interest. But even if a purchaser gave such notice, yet if it appears that the money was not actually and *bond fide* appropriated for the purchase, or that the purchaser derived the least advantage from it, or in any manner made use of it, the Court would compel him to pay interest.

In *Winter v. Blades* (*h*), the terms of the contract are not mentioned, but the other facts are thus stated: The bill in this cause was filed by the vendor of an estate, merely for the purpose of claiming interest on the purchase-money from the time the defendant, the purchaser, was let into possession. The purchase-money was 14,000*l.*, and immediately upon entering into the contract, the purchaser called in a sum of money, secured by a mortgage, amounting to 12,400*l.*, and upon entering into possession of the estate, gave notice to the vendor

(*d*) *Calcraft v. Roebuck*, 1 Ves. jun. 221.

(*e*) *Howland v. Morris*, 1 Cox, 59.

(*f*) *Calcraft v. Roebuck*, *ubi*

sup.; and see *Roberts v. Massey*, 13 Ves. jun. 561.

(*g*) *Powell v. Martyr*, 8 Ves. jun. 146. See *Comer v. Walkley*, *post*.

(*h*) 2 Sim. & Stu. 393.

that he was ready to invest the purchase-money as he should direct, pending the investigation of the title. The vendor, hoping for an immediate conclusion of the purchase, did not answer that notice. The investigation of the title, however, occupied nine months. The banker of the defendant proved that during the nine months the balance of the defendant in his hands was never less than 14,000*l.*, except during three successive days, when it was 13,876*l.*; and one other day, when it was 13,796*l.*

The Vice-Chancellor said, if after notice given by the defendant, he had made no profit of the purchase-money, then it would not be reasonable that he should be charged with interest. But that he has made some profit of the money appears upon the defendant's own evidence; first, because his balance at his bankers was in a small degree and for a few days reduced below the amount of the purchase-money, but principally because the purchase-money supplied the place of that balance, which he must otherwise have maintained at his bankers. It was decreed that the Master should inquire what was the average balance which the defendant maintained at his bankers during the three years preceding the purchase, computing such balances at the end of every month; and the Master was also to inquire what was the average balance which during the time in question the defendant maintained at his bankers, computing such balance monthly; and the Master was to deduct what he should find to have been the defendant's average balance for the three years, from what he should find to have been the defendant's average balance during the time in question, and it was declared that to the amount of that difference the defendant was not chargeable with interest on his purchase-money.

If no time be limited for performance of the agreement, and the purchaser be let into possession of the estate, he must pay interest on the purchase-money from that time(*i*).

It cannot, however, be laid down as a general rule, that a purchaser of estates under a private agreement shall, from the time of taking possession, pay interest. At any rate, although the conveyance be executed, yet he shall not pay interest but from the time of taking possession, if prevented from so doing by the vendor (*k*). But it must be a strong case, and clearly made out, in which he shall not pay interest where he has received the rents and profits (*l*).

Thus, in *Comer v. Walkley* (*m*), the purchaser had been in possession of the estate about twenty-two years, without any conveyance having been executed; and he had not paid the purchase-money. The delay was not attributable to him, and he stated that his money had been lying ready from the time of the contract, without interest being made by it, as he was in daily expectation of being called upon for payment of it; and therefore he insisted that he ought not to be compelled to pay interest. Lord Thurlow, however, decreed, that he should pay interest at four per cent. from the time he entered into possession to the time he paid the purchase-money into the Bank by the order of the Court.

And in a late case, where a particular day was appointed by the agreement for payment of the money, and the purchaser was to have a conveyance on payment of it, the purchaser entered before the conveyance was executed, and, after a delay of several years, during which he had

(*i*) See *ex parte* Manning, 2 P. Wms. 410.

(*k*) *Per* Lord Hardwicke, in *Blount v. Blount*, 3 Atk. 636.

(*l*) See 8 Ves. jun. 148, 149.

(*m*) Reg. Lib. A. 1784, fo. 625; *Smith v. Skelton*, Reg. Lib. B. 1799, fol. 307.

received the rents, being called upon to pay the purchase-money, *with interest*, he resisted the demand of interest; and in answer to a bill filed against him, it was insisted that interest was not payable, as the money was to be paid on an event depending upon an act to be done by the vendor (namely, the execution of the conveyance) forming a condition precedent to the payment of the purchase-money. But Sir Wm. Grant, Master of the Rolls, after observing that the purchaser did not allege that any circumstances had occurred entitling him to relinquish the contract, said, that the act of taking possession was an implied agreement to pay interest; for so absurd an agreement as that the purchaser was to receive the rents and profits to which he had no legal title, and the vendor was not to have interest, as he had no legal title to the money, could never be implied (*n*).

If it be agreed that the purchaser shall take possession of the estate, and pay interest on the purchase-money from that time, and it afterwards appear that a long time must elapse before a title can be made, the purchaser will be entitled to rescind the agreement.

But if the purchaser acquiesce in the delay until the contract is nearly carried into execution, he cannot then appropriate the purchase-money; and, by giving notice of that circumstance to the vendor, discharge himself from the payment of interest.

Thus, in *Dickenson v. Heron* (*o*), after the execution of a contract for purchase of an estate, it appeared that an act of parliament was necessary to perfect the title, and that some time must elapse before a title could be made; and it was therefore agreed that the purchaser should take possession of the estate, and pay interest on the purchase

(*n*) *Fludyer v. Cocker*, 12 Ves.
jun. 25.

(*o*) Rolls, 16th March 1804, MS.
See *Fludyer v. Cocker*, *supra*.

money. Great delays having arisen, and the purchaser thinking exchequer bills, in which the purchase money was invested, not safe, he sold them, and gave notice to the vendor that the money was lying ready, and without interest being made of it. After the purchase was completed, and the money paid, the vendor filed a bill, asserting his right to interest until the execution of the conveyance.

The cause was heard before Sir Wm. Grant, Master of the Rolls, who pronounced the following judgment:—
“ An agreement of this nature is totally independent of the interest made by the money. When a purchaser is let into possession, the vendor need not mind what is done with the purchase-money, because the purchaser agrees to pay interest for the money. And such an agreement can only be affected by great delay, because the purchaser is not to be kept for ever bound by a disadvantageous bargain; for the interest might be better than the rents; in which case, if the purchaser was to be bound, notwithstanding an unreasonable delay, the vendor would not mind how long he delayed making a title. If the objection had been taken at a different time it would have been better. He should have made the objection when he knew that an act of parliament was necessary, as he was not before in possession of that fact. But he waved this delay, and he consents to continue to pay interest, and writes a letter which clearly implies that; or he might have waved the agreement. Afterwards he thinks he is entitled to say that he will not pay interest. The ground was totally distinct. He had laid out his money in exchequer bills, and then, upon a supposition that they were not safe, he sold out, and then gave notice that he would not pay interest. He ought certainly to have given notice before he sold out, and to have given the vendor

his option, whether he would choose them to remain at his risk, or would wave his interest. This ground was, however, nothing to the vendor, as he had nothing to do with the interest. The only ground upon which he could have waved the agreement, was the delay in the first instance. The defendant mistook his case ; he might have come at an earlier period, and insisted not to pay interest ; for a Court would not have held him to an indefinite period. Besides the notice was not given until a long delay could not take place." And the Master of the Rolls for these reasons decreed the purchaser to pay interest ; but, as he bound himself by his long acquiescence, his Honor would not give costs, and interest was only given up to the time the conveyance was delivered to the vendor's attorney for execution, although it was not executed until three months afterwards.

Where it was stipulated that the purchaser was to pay a deposit of twenty-five per cent, and in case of delay five per cent interest on the purchase-money unpaid, and that the auction-duty was to be borne equally by the vendor and purchaser, the deposit was paid by the purchaser, but he did not pay any part of the auction-duty, and the Court compelled him to pay interest on half of the amount of the auction-duty at five per cent, on the ground that the sum paid into the hands of the auctioneer by the purchaser had been less by the moiety of the auction-duty than it ought to have been ; and the circumstance that the auctioneer had applied the deposit in payment of the auction-duty was considered as of no weight (*p*).

In the case of timber on an estate to be taken at a valuation, interest on the purchase-money will only commence from the valuation, although the interest on the purchase money for the estate itself may be carried a

(*p*) *Townshend v. Townshend*, 2 Russ. 303.

great way back, because surveyors always value timber according to its present state ; and the augmented value of the timber by growth, is an equivalent for the interest from the time of the contract to the making of the valuation (*q*).

Upon the sale of an estate in possession, under the order of a court of equity, the rule is, that the purchaser is entitled to the possession or rents from the quarter-day preceding his purchase, paying his money before the following one (*r*).

Where a reversion is sold under the order of a court of equity, it seems that interest must be paid from the very day upon which the purchaser could have confirmed the report of his being the best bidder ; because, from that time, the purchaser is sure of his title and of his purchase ; the estate is bound, and the party who is to convey becomes but a trustee for the purchaser, who ought to have his money ready (*s*). And the same rule applies to an annuity, from which time only the purchaser is entitled to receive the annuity (*t*).

Formerly the practice seems to have been, where estates for life dropped in between a person being reported the best purchaser, before a Master, and his taking possession, to direct the purchaser to make some compensation in consideration of the estate being bettered, or otherwise to go before a Master again, and the estate to be put up for a new bidding (*u*), but the rule is now settled as above stated, and the purchaser, from the time

(*q*) *Waldron v. Forester*, Excheq. June 30, 1807, MS. *Vide infra*.

(*r*) *Supra*, p. 55. See *Mackzell v. Hunt*, 2 Mad. 34, n.

(*s*) *Ex parte Manning*, 2 P. Wms. 412 ; *Child v. Lord Abingdon*, 1 Ves. jun. 94 ; *Twigg v.*

Fifield, 13 Ves. jun. 517 ; but see *Davy v. Barber*, 2 Atk. 489 ; *Blount v. Blount*, 3 Atk. 636 ; *Growsock v. Smith*, 3 Anstr. 877.

(*t*) *Twigg v. Fifield*, 13 Ves. jun. 517.

(*u*) *Blount v. Blount*, 3 Atk. 636. See *Davy v. Barber*, 2 Atk. 489.

the report is or might be confirmed, is entitled to any benefit by the dropping of lives, or the like.

In *Kenny v. Wrenham*, a life-annuity was sold on the 18th of April 1818, for 280*l.* to be paid by instalments; 200*l.* in October 1818, and the residue on or before 1st January 1819. It was held that the purchaser was entitled to the annuity from the time of payment of the last, and not from that of the first instalment of the price (*x*).

If, subsequently to a written contract, an agreement be made, that the purchaser shall pay interest on the purchase-money from a particular time, and the agreement is reduced into writing, but signed by the vendor only; yet, if the contract has been in part performed, the purchaser will be bound by the subsequent agreement (*y*).

If a purchaser make payments to a seller exceeding the interest due on the purchase-money, of course rests must be made, and the balance only will carry interest (*z*).

Where a leasehold estate is sold, and possession is not delivered to the purchaser, if any delay occurs, as it would not be just to make the purchaser pay the whole purchase-money, after part of the term is elapsed, without his having derived any benefit from the estate, the Court will compel the vendor to pay a rent in respect of his occupation of the estate: and the purchaser to pay interest on the purchase-money during the delay (*a*).

If a tenant for years, at a rent, with an option to purchase the fee, declare his option, he is entitled to retain the rent from that time, and in lieu of it must be charged with interest upon his purchase-money (*b*).

And where a purchaser has not been in possession of

(*x*) 6 Madd. 355.

(*y*) *Owen v. Davies*, 1 Ves. 82.

(*z*) *Griffith v. Heaton*, 1 Sim. & Stu. 271.

(*a*) *Dyer v. Hargrave*, 10 Ves. jun. 505.

(*b*) *Townley v. Bedwell*, 14 Ves. 591.

the estate, and the seller receives interest, he will be compelled to pay not only the rent which he has received, but that which without his wilful default he might have received (*c*).

In a late case, where the contract had been delayed upwards of fifteen years, by the default of the seller, who had received one third of the purchase-money, and also all the rents of the estate, Sir Thomas Plumer, Master of the Rolls, compelled the seller to account not only for the rents, but for interest at four per cent. upon one third of them (*d*).

Where, however, interest is much more in amount than the rents and profits, and it is clearly made out that the delay was occasioned by the vendor, to give effect to the general rule would be to enable the vendor to profit by his own wrong; and the Court therefore gives the vendor no interest, but leaves him in possession of the interim rents and profits (*e*).

But where there is an express stipulation, that if the conveyance is not executed, and the purchase-money paid by the day named, interest shall be paid until the purchase is completed, it has been held that the terms of that stipulation apply to every delay, however occasioned (*f*).

In a case where a public-house was sold, with the goodwill and the licenses, and the furniture, stock, &c. were to be taken at a valuation, and the purchase to be completed at a day named, but the seller continued to carry on the trade beyond that day, although the valuations were made, the purchaser objecting to the title:

(*c*) *Acland v. Gaisford*, 2 Mer. 28; *Wilson v. Clapham*, MS.; 1 Jac. & Walk. 36, S. C. Mertins, 3 Atk. 1; 12 Ves. jun. 28; *Wilde v. Fort*, 4 Taunt. 334.

(*d*) *Burton v. Todd*, *Todd v. Gee*, 31 Mar. 1818, MS. Appendix, No. 20. See *Lacon v.* (*e*) *Esdaile v. Stephenson*, 1 Sim. & Stu. 122; *Paton v. Rogers*, 6 Madd. 256.

(*f*) S. C.

The purchaser was held bound to perform the contract ; and the principle was followed up by charging the purchaser with interest on the purchase-money and valuation, and with the money expended in the business, and giving him the produce of the business, and the purchaser was to have the present stock in trade. But upon appeal, it was decided that the purchaser was not liable for the transactions of the trade, and was only to pay for so much of the original stock in trade as could be delivered to him, and was not bound to take the new stock ; but the purchaser was charged with the rent, taxes, and other necessary outgoings of the premises since the time appointed for performance of the contract, with interest thereon, and he was refused an occupation-rent which he claimed from the seller (*g*).

The purchaser never pays interest on the deposit, although by his default the seller may have been prevented from receiving it from the auctioneer (*h*).

It frequently happens, that part of the purchase-money is left in the hands of the purchaser, for the purpose of paying off incumbrances at some distant period ; and, in that case, the purchaser must pay interest for it to the vendor (*i*).

In *Comer v. Walkley* (*k*), it appeared, that a sum was left in the purchaser's hands, at interest, as an indemnity against an incumbrance. The purchaser afterwards paid part of the sum to the vendor ; notwithstanding which, the purchaser and his devisees continued to pay interest on the whole for many years. A bill was at length filed to compel payment of the residue of the sum deposited ;

(*g*) *Dakin v. Cope*, 2 Russ. 170.

(*h*) *Bridges v. Robinson*, 3 Mer. 694.

(*i*) *Hughes v. Kearney*, 1 Scho. & Lef. 132.

(*k*) Reg. Lib. A. 1784, fo. 625.

and the mistake being admitted, the Master was directed to take annual rests of the over-payments, and to compute interest thereon at five per cent. and the amount of the over-payment and interest to be deducted from the sum which would be found due from the purchaser.

Where a purchaser is entitled to recover at law a deposit paid by him to the vendor, he can also recover interest on it from the time it was paid, without an express agreement.

But where he proceeds against the auctioneer to whom the deposit was paid, he cannot recover interest unless under particular circumstances ; *e. g.* where, when the title was made out, if the auctioneer was called upon to pay it over, and refused, he might be liable from that time, or perhaps if he actually made interest of the deposit (*l*). An auctioneer ought not to be liable generally to interest: for an auctioneer is bound to keep a deposit till the execution of the contract, as a banker or depositary of it: for which reason it seems doubtful whether, if he actually made interest of it, he ought to be compelled to pay interest (*m*).

If interest be recovered against an auctioneer, and he himself be not in fault, he may recover it from the vendor (*n*).

And where the statute of limitations has run, and it is pleaded, but the auctioneer pays the deposit into court, he cannot be compelled to pay interest; although, but for the statute, the deposit would have carried interest,

(*l*) *Farquhar v. Farley*, 7 Taunt. 592; *Lee v. Munn*, 8 Taunt. 45; 1 Moore, 481.

(*m*) See *Lord Salisbury v. Wilkenson*, 8 Ves. jun. 48; and 3 Bro. C. C. 44; 14 Ves. jun. 509, cited. See also *Browne v. Southhouse*, 3 Bro. C. C. 107; *sed vide*

Willis v. the Commissioners of Appeals in Prize Causes, 5 East, 22.

(*n*) See *Spurrier v. Elderton*, 5 Esp. Ca. 1. As to interest where the action is for money had and received, *vide sup.* p. 225.

as the payment of the principal does not raise any implied promise to pay the interest (*o*).

And where the purchaser recovers the deposit only from the auctioneer, he may, in an action against the seller, recover interest on it, and the expenses of investigating the title, under an averment of special damage (*p*).

If a vendor cannot make a good title, and the purchaser's money has been lying ready, without interest being made by it, the vendor must pay interest to the purchaser (*q*).

Thus the law seemed to stand upon the decided cases, and the practice appeared to be conformable to it. But in consequence of some *general* rules as to interest, which were laid down by Lord Ellenborough, in some cases at *nisi prius*, it was thought, by some, that interest could not be recovered in many cases in which it had formerly been obtained (*r*). These rules, however, were not intended to embrace every possible case; for it was not denied that interest may be recovered upon an *implied* contract for payment of it (*s*); and, accordingly, in a case before Lord Ellenborough at *nisi prius*, where the title was bad, and the purchaser, in his action for recovery of the deposit, declared specially, and alleged by way of special damage, that by reason of a good title not being made, he had lost and been deprived of the use of the money which he had deposited, according to the conditions of sale, Lord Ellenborough said, that they had lately held that interest was not recoverable on money lent without some evidence of a contract for that purpose;

(*o*) *Collyer v. Willock*, 4 Bingh. 313.

(*p*) *Farquhar v. Farley*, 7 Taunt. 592.

(*q*) *Fleureau v. Thornhill*, 2 Black. 1070.

(*r*) *De Havilland v. Bowerbank*; *Crockford v. Winter*, 1 Camp. Ca. 50, 124; *De Bernales v. Fuller*, 2 Camp. Ca. 426.

(*s*) *Calton v. Bragg*, 15 East, 212.

but he thought that the plaintiff, in the case before him, ought to be allowed interest, as special damage from the day when the purchase ought to have been completed. He averred in his declaration, that by the defendant's breach of contract he had since lost the use of his money, and he had proved that averment. There seemed to be no reason, therefore, why this loss should not be compensated to him by the allowance of interest on his deposit, and the purchaser had a verdict accordingly (*t*). Mansfield, C. J. however, ruled otherwise at *nisi prius* (*u*); but Lord Ellenborough's decision agrees with the general practice of the Profession, and has been since followed by the Court of Common Pleas (*v*).

Where the biddings before a Master are opened, the purchaser will be allowed interest at the rate of 4 *per cent. per annum*, on such part of the purchase-monies as the Master shall find to have lain dead (*x*).

Where the purchaser pays into court a sum of money on account, and in part of the purchase-money, which is invested at the request of the vendor (*y*), it is the money of the vendor, who is to take the chance of the rise or fall of the stocks (*z*).

Where a purchase by a trustee is set aside, and the estate restored to the *cestui que trust*, the purchaser is allowed interest on the money paid by him, and is compelled to pay a rent for the estate during his enjoyment of it (*a*).

(*t*) *De Bernales v. Wood*, 3 Camp. Ca. 258.

(*u*) *Wilde v. Fort*, 4 Taunt. 334. See *Maberley v. Robins*, 1 Marsh, 258; 5 Taunt. 625.

(*v*) *Farquhar v. Farley*, 7 Taunt. 592.

(*x*) This was directed on open-

ing the biddings for General Birch's estate, MS.

(*y*) This fact does not appear in the Report. S. C. MS.

(*z*) *Gell v. Watson*, 2 Sim. & Stu. 402.

(*a*) *Infra*, ch. 14.

But where a sale is annulled on account of notice in the purchaser, of a prior claim, and he is decreed to account for the rents, it seems that he shall not be charged with interest on the rents (*b*).

Where a purchase was set aside on the ground of fraud, and the purchaser was decreed to pay an occupation-rent, and to be repaid his purchase-money and interest, annual rests were directed, so that the excess of rent beyond the interest might go in reduction of the capital (*c*).

An agreement, that if the purchase-money be not paid at the time stipulated, the purchaser shall pay a rent for the estate, exceeding the legal interest of the money, is not usurious (*d*).

And an agreement to sell an estate for a principal sum, which, *with interest* added thereto after the rate of 6*l.* per cent. per annum, for the time the notes had to run, was secured by certain promissory notes according to the contract, was held not to be a usurious contract. The Lord Chief Justice said that the case arose out of a contract for the sale of an estate, and not for the loan of money. The agreement was founded partly upon what was considered the present price, if paid for at a future day. The only difficulty had been occasioned by calling the difference between these two prices *interest* ; but it was their duty to look, not at the form and words, but at the substance of the transaction ; and as on the one hand they should not pay attention to the words of the contract if the substance of it went to defeat the provisions of the statute of the 12 Anne, c. 16, so on the other hand they ought not to rely upon the words so as to defeat the contract, if in substance the transaction was legal. It appeared to him, that in substance this was a contract for sale of the estate at the price of 20,800*l.*

(*b*) *Macartney v. Blackwood*, Irish Term Rep. 602.

(*c*) *Donovan v. Fricker*, 1 Jac. 165.

(*d*) *Spurrier v. Mayoss*, 1 Ves. jun. 527 ; 4 Bro. C. C. 28.

to be paid by instalments ; in that there was no illegality ; the defence set up therefore failed (e).

II. Where interest is recovered at law, it is always at the rate of 5 *per cent.*, but in equity the rate of interest allowed is 4 *per cent.* (f).

In *Blount v. Blount* (g), Lord Hardwicke said, the Court would give such interest as was agreeable to the nature of the land purchased ; but this seems never to be taken into consideration, nor indeed ought it to be ; interest being given not so much on account of the profits of the estate, as the unjust detention of the purchase-money.

In *Dickenson v. Heron* (h), at the time the purchaser took possession of the estate, it was agreed he should pay interest on the purchase-money, but no rate was fixed. The purchase-money, however, then produced 5 *per cent.*, and it was understood between the parties that interest was to be paid at that rate ; and although this understanding did not appear by any note or writing, the purchaser was decreed to pay interest at 5 *per cent.*

And in a case in the Court of Exchequer, it appeared that one tenant in common had sold his share of the estate, and of the timber, to the other, who was let into possession, but no stipulation was made as to interest. The purchase-money was not paid. A bill was filed by

(e) *Beete v. Bidgood*, 7 Barn. & Cress. 453.

(f) *Calcraft v. Roebuck*, 1 Ves. jun. 221 ; *Child v. Lord Abingdon*, 1 Ves. jun. 94 ; *Cornier v. Walkley*, Reg. Lib. A. 1784, fo. 625 ; *Pollexfen v. Moore*, Reg. Lib. B. 1745, fo. 283, at the bottom ; *Smith v. Hibbard*, Chanc. 11 July 1789 ; *M'Queen v. Far-*

quhar, Lib. Reg. B. 1804, fol. 1005 ; *Browne v. Fenton*, Rolls, June 23, 1807, MS., and see Lord Rosslyn's judgment in *Lloyd v. Collet*, 4 Ves. jun. 609, n ; *Acland v. Gainford*, 2 Mad. 28 ; *Bradshaw v. Midgeley*, V. C. 13 Nov. 1817, MS.

(g) 3 Atk. 636.

(h) *Supra*, p. 505.

the vendor for a specific performance, and a motion was made that the purchase-money might be paid into Court, or a receiver appointed of the estate sold. And it was accordingly referred to the Master to appoint a receiver, who was directed to pay to the vendor, out of the rents, "interest after the rate of 5 *per centum per annum*, upon the amount of the purchase-money, and the value of the timber on the estate (*i*).” This cause afterwards came to a hearing, when a specific performance was decreed, and the purchaser was decreed to pay interest. A question then arose as to the quantum, and it was decreed, that the purchaser should pay 5 *per cent.*, although it was insisted that 5 *per cent.* was never given, particularly when not prayed by the bill. Lord C. B. Macdonald said, that as to the quantum, he conceived that nothing less than 5 *per cent.* would be a compensation to the vendor, and that, indeed, they had in many cases, lately given 5 *per cent.* interest, and the reason of it was too well founded to need any discussion : a person would always find it to be his interest to delay the completion of his purchase, when he knows that he is only to pay 4 *per cent.*, and can make five or six of his money. Mr. Baron Thompson concurred. Mr. Baron Graham wished there had been a general rule, but the Courts had been in the habit of giving 5 *per cent.* where there was delay. The reasons formerly given had now no ground. The 4 *per cent.* when established, was the current interest, but now, it was holding out an inducement to persons to delay the completion of contracts, as it was notorious that money could not be obtained for even five. Besides, here the Court had forejudged the question in making the former order, although that was without prejudice. Mr. Baron Wood

(*i*) *Waldron v. Forester*, Exch. Lord Lowther, 12 Vcs. jun. 107 ; 4th May 1804, MS.; *Gaskarth v.* and see *ib.* 503.

concurred, and the Court carried back the interest to Lady-day 1802, when it seems they thought, upon the construction of the several agreements and letters which had passed, that the contract ought to have been completed (*k*).

In a very recent case 5 *per cent.* was decreed to be paid, although the conditions of sale were silent as to interest. The purchaser was held to have accepted the title by taking possession ; and the Court said, that they thought where a purchaser withheld the money from the seller, he ought to pay such interest as the seller might have made of the money had it been paid to him, and that this had frequently been done by Lord Alvanley (*l*).

However, this is not the rule of the Court of Chancery. And, in a case where the conditions of sale stipulated that the purchaser should be allowed 5 *per cent.* on the deposit if a title could not be made, but did not contain any other stipulation as to interest ; after a decree in a bill by the seller for a specific performance, upon a motion to vary the minutes, by making the interest payable on the purchase-money 5 *per cent.*, the Vice-Chancellor was of opinion that the general rule must prevail, and that the minutes of the decree were correct, confining the interest to 4 *per cent.*, and gave the purchaser his costs of opposing the motion (*m*).

The same rate of interest seems payable, whether the estate be sold by private agreement, or by a master under a decree of a court of equity.

As connected with interest, we may here observe, that if the completion of a purchase has been delayed by the

(*k*) Excheq. 30th June 1807, Rolls, 7 Feb. 1820, MS.; 1 Jac. MS. & Walk. 168.

(*l*) Burnell v. Brown, Lord C. Baron sitting for the Master of the (m) Thorp v. Freer, H. T. 1820, MS.

state of the title, the Court will compel the seller to make an allowance for any deterioration which the lands, hedges and fences have suffered by unhusbandman-like conduct and mismanagement since the date of the contract (*n*).

But a purchaser is not entitled to any allowance for deterioration after he took possession, or after there was a title under which he might have taken possession (*o*).

Where in a specific-performance suit, the purchaser, who claimed an allowance for deterioration, paid his purchase-money into Court under an order, and the amount to be allowed for deterioration was afterwards fixed, he was held entitled to the amount, with interest from the time when he paid his money into court (*p*).

SECTION II.

Of Costs.

At law, the costs abide the event of the action by the vendor or purchaser. In equity, also, the person who fails in the suit must *primâ facie* be deemed liable to the costs. But still, although this is the general rule, yet costs in equity rest entirely in the breast of the Court, for the *primâ facie* claim to costs may be rebutted by the particular circumstances of the case; and it is for the Court to decide whether those circumstances are, or are not, sufficient to rebut the claim (*q*).

If a purchaser file a bill for a specific performance, which is dismissed because the defendant, the seller, can-

(*n*) *Foster v. Deacon*, 3 Madd. 394, and several cases not reported.

(*o*) *Binks v. Lord Rokeby*, 2 Swanst. 226.

(*p*) *Ferguson v. Tadman*, 1 Sim. 530.

(*q*) *Vancouver v. Bliss*, 11 Ves. jun. 458. See *Scorbrough v. Burton*, Barnard. Cha. Ca. 255.

not make a title; yet the bill may be dismissed with costs against the defendant (*r*).

If the vendor file a bill for a specific performance, which is dismissed because he cannot make a title, and the estate was misrepresented in the particulars, although without fraud, he must pay the costs (*s*). If the estate was misrepresented, and the auctioneer verbally agreed to allow a deduction if any misrepresentation should appear, the seller's bill would be dismissed, with costs, if he sought to compel the purchaser to take the estate without any allowance, because that would be a fraud. But if the purchaser do not resort to the defence set up by his answer, until after the institution of the suit, that is a ground not to give costs (*t*).

Where there is no misrepresentation, and the question turns upon a point of law, upon which the opinion of the Court might fairly be taken, although the bill be dismissed against the vendor, yet it will be without costs (*u*). If a purchaser is entitled to costs, it is immaterial that the seller was only a trustee for sale (*x*).

But where the bill is dismissed against the purchaser with costs, yet he will not be allowed costs of objections argued before the Master, but abandoned at the hearing (*y*).

So a purchaser is considered as entitled to take a fair objection, and although it be overruled, yet the Court will not on that ground give costs (*z*), but this, of course, must always depend upon the weight which the Judge

(*r*) See and consider *Benet College v. Carey*, 3 Bro. C. C. 390; *Lewis v. Loxham*, 3 Mer. 429.

(*s*) *Vancouver v. Bliss*, *ubi sup.*

(*t*) *Winch v. Winchester*, 1 Ves. & Beam. 375.

(*u*) *White v. Foljambe*, 11 Ves. jun. 337. See *ibid.* 463.

(*x*) *Edwards v. Harvey*, Coop. 40.

(*y*) *Hayes v. Bailey*, L. C. M. T. 1821, MS.

(*z*) *Cox v. Chamberlain*, 4 Ves. jun. 631; *Stains v. Morris*, 1 Ves. & Beam. 8; *Sharpe v. Roache*, 2 Rose, 192.

may think due to the objection (*a*). In one case, indeed, Lord Eldon thought that as the title was forced upon the purchaser, he should act hardly by him, by not giving the title the credit of making him pay the costs, for it would, he said, help the title. As, however, the vendor had contended, but unsuccessfully, that the purchaser had done acts amounting to an acceptance of the title, his Lordship refused costs (*b*).

Where the objection to the title has already been decided in a former cause, of which the purchaser had notice, the purchaser will be decreed to pay the costs of the suit (*c*).

And although a purchaser may fairly object to a title on the ground of a doubtful fact; yet if the fact is found against him, he cannot claim costs, although he will not be compelled to pay them. This was decided in *Thorpe v. Freer* (*d*), where the bankrupt was made a party to the suit, to establish the fact that he had not executed the power before his bankruptcy. He demurred to the bill, as he might be examined in the bankruptcy, and Sir John Leach, Vice-Chancellor, allowed the demurrer. He was then examined before the commissioners, and upon the examination it was held that the power remained unexecuted. Upon these grounds it was contended on behalf of the purchaser that he was entitled to his costs, as it was necessary to establish the fact, but they were refused to him on the ground above stated.

In a case where the Master reported that the abstract delivered by the vendor before the filing of the bill was

(*a*) *Burnaby v. Griffin*, 3 Ves. jun. 266; *Bishop of Winchester v. Paine*, 11 Ves. jun. 195. See *Powell v. Martyr*, 8 Ves. jun. 146; *Fludyer v. Cocker*, 12 Ves. jun. 25; *Calverley v. Williams*, 1 Ves. jun. 210.
 (*b*) *M'Queen v. Farquhar*, 11 Ves. jun. 467.
 (*c*) *Biscoe v. Wilks*, 3 Mer. 456.
 (*d*) MS. See 4 Madd. 466.

sufficient, but he found that the purchaser required certain evidence in support of the abstract, some of which was necessary, but not furnished, and some not necessary, the Lord Chancellor held that both of the parties were in the wrong; and, upon the vendor's bill, his Lordship held that no costs ought to be given on either side (*e*).

Where a seller does not make out his title until after the bill is filed, he is liable to pay the costs of the suit up to the time that he showed a good title (*f*). But the Court will not let this rule operate as a trap for the seller; and if further abstracts are furnished after the bill is filed, will inquire whether they are material. So, as to evidence. But, as to evidence, much depends upon the fact whether further evidence was required by the purchaser. In one case an act of parliament, for releasing the estate from certain portions, was obtained after the filing of the bill. The Master found that a good title was shown when the act was delivered to the purchaser. The purchaser claimed the costs to a later day, on the ground that the act recited a release by deed of other portions, an abstract of which had not been furnished. The Vice-Chancellor held that the act was tantamount to an abstract, and that the purchaser should have called for an abstract for the deed, if he had intended to insist upon the want of it, as an objection (*g*).

In the case of *Smith v. Leigh* (*h*), the Master found that the seller could make a title in February 1820, which was subsequently to filing the bill. To the Master's report the purchaser took an exception, and elected to have

(*e*) *Newall v. Smith*, 1 Jac. & Walk. 263.

(*f*) *Wilson v. Allen*, 1 Jac. & Walk. 623, and many MS. cases. See *Wynn v. Morgan*, 7 Ves. jun. 202; *Collinge's case*, 3 Ves. &

Bea. 143, n. (*a*); *Lewin v. Guest*, 3 Russ. 325.

(*g*) *Emery v. Growcock*, 1821, MS.

(*h*) V. C. 10 Aug. 1821, MS.

a case sent to law, which the Vice-Chancellor granted as a matter of course. The point was decided against him; and, upon the cause coming on for further directions, the exception was overruled, and a specific performance decreed, and the purchaser was to be paid the costs up to February 1820, other than the costs of his insisting, by his answer, on the illegality or abandonment of the agreement, and the purchaser was to pay the costs of the subsequent proceedings before the Master, and the costs of the case to the Common Pleas, and the plaintiff was to pay the costs of the hearing.

In the case of *Bruce v. Bainbridge* (*i*) where the bill was filed by the seller, the Master's report was in favour of the title, a case was sent to the C. P., and the certificate was against the title. The bill was dismissed, with costs, from the date of the Master's report.

But if a good title is not shown until *after* the bill is filed, and the purchaser take no step inconsistent with the finding of the Master, the seller must pay the costs of the whole suit (*k*).

If a seller, upon a reference to the Master, establish his title upon a different ground from what appeared in the abstract, the purchaser will be allowed the costs of the reference and the applications to the Court (*l*). So, where a purchaser might in the first instance have rescinded the contract, but binds himself by long acquiescence, the vendor will not be entitled to costs (*m*).

Lord Thurlow has said, that if a purchaser will not wait until the title is cleared, but will take possession, and put the vendor to all the inconvenience of the discussion, when he is out of possession, and the other has got it,

(*i*) Same day, MS.

(*k*) *Annesley v. Muggeridge*,

V. C. 12 Mar. 1825, MS.

(*l*) *Fielder v. Higginson*, 3 Ves. & Bea. 142.

(*m*) *Dickenson v. Heron*, *sup.* p. 505.

that weighs much as to costs (*n*). But the circumstance of taking possession is not important, where, by the terms of the contract, the title is to be made good at a subsequent period, much less is it material where the purchaser is induced to take possession at the instance of the vendor himself (*o*).

It is, however, to be repeated, that every case must stand on its own grounds, although, from these few instances, some notion may perhaps be formed of what the Court is likely to do in other cases. To multiply the instances in which costs in equity have been given or refused would be as useless as it would be tedious.

(*n*) 11 Ves. jun. 464. See *Calcraft v. Roebuck*, 1 Ves. jun. 222.

(*o*) 11 Ves. jun. 464. *Vide sup.* p. 10.

CHAPTER XI.

OF THE OBLIGATION OF A PURCHASER TO SEE TO THE APPLICATION OF THE PURCHASE MONEY.

WHERE a trust is raised by deed or will for sale of an estate, a clause, that the receipts of the trustees shall be sufficient discharges for the purchase-money, is mostly inserted, and rarely ought to be omitted; because, notwithstanding that a purchaser would, at law, be safe in paying the money to the vendors, although they were trustees, yet equity will, in some cases, bind purchasers to see the money applied according to the trust, if they be not expressly relieved from that obligation by the author of the trust; and where the purchaser is bound to see to the application of the money, great inconvenience frequently ensues, and, in some instances, it would be difficult to compel the purchaser to complete the contract.

The rules on this subject may be considered under two heads: First, with respect to real estate. Secondly, with respect to leaseholds, or chattels real. For the rules applicable to the different species of estates are dissimilar; owing to the much greater power which a testator has over his real, than over his personal estate.

Previously to the statute of fraudulent devises (*a*), freehold lands were not bound by even specialty debts in the hands of an *hæres factum*; although an *hæres natus* was liable to specialty debts in respect of land descended (1);

(*a*) 3 W. & M. c. 14.

(1) Although an heir at law is bound by specialty debts in respect of lands descended, yet a purchaser of those lands, without notice of any debts, was never holden to be subject to them. The statute of fraudulent devises was always considered as placing a devisee on exactly the

but personal property, which was formerly of very trifling value, was always holden to be subject to the *payment of debts generally*, however the same might be bequeathed. And by the statute of Westminster 2, (b), it was enacted, that even the ordinary should be bound to pay the debts of the intestate, so far as his goods would extend, in the same manner as executors were bound in case the deceased had left a will. In fact no man can exempt his personalty from the payment of his debts ; but it must go to his executors as assets for his creditors, and be applied in a due course of administration ; that is, *however it may be bequeathed*, it must go to the executors, upon trust, in the first place, for payment of debts generally. Now, although the author of the trust may have neglected to free the purchasers of his property from the obligation of seeing that the money is duly applied, yet equity hath thought it reasonable that a purchaser should see to the application of the purchase-money where the trust is of a defined and limited nature only ; and not where the trust is general and unlimited, as a trust for payment of debts generally.

From these rules it necessarily follows that a *bond fide* purchaser of a leasehold estate from an executor ought not to be bound to see to the application of the purchase-money, although defined and limited trusts be declared of the purchase-money. But, as a testator can declare

(b) 13 Ed. I. c. 19.

same footing as an heir at law ; but it was lately contended (see *Matthews v. Jones*, 2 Anst. 506,) that the debts of the testator would bind a purchaser from the devisee, although he bought *bonâ fide* and without notice. But this was overruled. Equity will, however, in behalf of creditors, grant an injunction against a purchaser to restrain payment to the heir. *Green v. Lowes*, 3 Bro. C. C. 217. In *Woodgate v. Woodgate*, MS. Lord Eldon was of opinion, that simple-contract creditors, under 47 Geo. III. stand in the above respect in the same situation as specialty creditors under the statute of fraudulent devises.

an *original* limited trust of his real estate, wherever such a trust is created, the purchaser is bound to see the money duly applied.

SECTION I.

Of this Liability, with reference to Real Estate.

THESE appear to be the principles upon which the distinctions on this subject are grounded, and we may now enter upon an examination of the rules themselves. And first, with respect to real estate.

1. If the trust be of such a nature, that the purchaser may reasonably be expected to see to the application of the purchase-money, as if it be for the payment of legacies, or of debts which are scheduled or specified, he is bound to see that the money is applied accordingly(c); and that although the estate be sold under a decree of a court of equity(d), or by virtue of an act of parliament(e).

And the 47 Geo. 3, c. 74, which makes the real estates of traders liable to simple-contract debts, does not alter the rule; and therefore a purchaser from a devisee of a trader is liable to the application of the purchase-

(c) Culpepper v. Aston, 2 Cha. Ca. 221. See Show. 313; Spalding v. Shalmer, 1 Vern. 301; Dunch v. Kent, 1 Vern. 260; Anon. Mose. 96; Abbot v. Gibbs, 1 Eq. Ca. Abr. 358, pl. 2; Elliott v. Merryman, Barnard. Rep. Cha. 81; Smith v. Guyon, 1 Bro. C. C. 186, and

the cases cited in the note(I); and see 1 Ves. 215.

(d) Lloyd v. Baldwin, 1 Ves. 173. See Binks v. Lord Rokeby, 2 Madd. 227.

(e) Cotterell v. Hampson, 2 Vern. 5.

(I) One of these cases, Langley v. Lord Oxford, is in Reg. Lib. B. 1747, fol. 300; see *post*, S. C. Ambl. 17. The other cases, Tenant v. Jackson, and Cotton v. Everall, are in Reg. Lib. 1773, B. fol. 120, 481.

money where legacies only are charged on the estate by the will (*f*).

2. If more of an estate be sold than is sufficient for the purposes of the trust, that will not turn to the prejudice of the purchaser; for the trustees cannot sell just sufficient to pay the debts, &c. Besides, in most cases, money is to be raised to pay the trustees expenses (*g*).

3. Where the trust is for payment of debts generally, a purchaser is not bound to see to the application of the purchase-money, although he has notice of the debts; for a purchaser cannot be expected to see to the due observance of a trust so unlimited and undefined (*h*).

4. Nor is a purchaser bound to see the money applied, where the trust is for payment of debts generally, and also for payment of legacies (I); because, to hold that he is liable to see the legacies paid, would in fact involve him in the account of the debts, which must be first paid (*i*) (II).

(*f*) *Horn v. Horn*, 2 Sim. & Stu. 448.

(*g*) *Spalding v. Shalmer*, 1 Vern. 301.

(*h*) See the cases cited above, and *Humble v. Bill*, 1 Eq. Ca. Abr. 358, pl. 4; *Ex parte Turner*, 9 Mod. 418; *Hardwicke v. Mynd*,

1 Anstr. 109; and *Williamson v. Curtis*, 3 Bro. C. C. 96; *Barker v. Duke of Devon*, 3 Mer. 310.

(*i*) *Jebb v. Abbot*, and *Benyon v. Collins*, Butler's n. (1) to Co. Litt. 290 b, s. 12; and *Rogers v. Skillicorne*, Ambl. 188.

(I) The above rule, although so long and clearly settled, appears to have been entirely overlooked in the case of *Omerod v. Hardman*, before the Duchy Court, reported in 5 Ves. jun. 722; but this case can by no means be considered as an authority, and has been expressly denied by Lord Eldon. See 6 Ves. jun. 654, n. *Qu.* however, whether the case of *Omerod v. Hardman* was not thought to be within the principle stated in pl. 13, *post*.

(II) And where the whole money has been raised, the heir or devisee will be entitled to the estates unsold, and the creditors or legatees will have no remedy against the same; because the estate is debtor for the debts and legacies, but not for the faults of the trustees. *Anon.* in Dom. Proc. 1 Salk. 153.

5. And for the same reason the purchaser is, of course, not bound to see that only so much of the estate is sold as is necessary for the purposes of the trust.

6. But although there be no specification of the debts, yet a purchaser, it is said, must see to the application of the money where there has been a decree ; as that reduces it to as much certainty as a schedule of the debts. In such cases, therefore, the purchaser should not pay to the trustees, but must see to the application, and take assignments from the creditors : otherwise he should apply to the Court, that the money may be placed in the Bank, and not taken out without notice to him ; the reason of which is, that it is at his peril (*k*). It is now, however, the prevailing opinion that the purchaser is not, in such a case, bound to see to the application of the money. The Court takes upon itself the application of the money.

7. It is the general opinion of the Profession, that where *the time of sale is arrived*, and the persons entitled to the money are infants or unborn, the purchaser is not bound to see to the application of the money ; because he would otherwise be implicated in a trust, which in some cases might be of long duration. This point has lately been so decided (*l*).

8. But if an estate is charged with a sum of money for an infant, payable at his majority, and there is no direction to appropriate the money, a purchaser cannot safely complete his purchase, although the money be invested in the funds as a security for the payment of the legacy to the infant, when he shall become entitled ; for if, in the event, the fund should turn out deficient for payment of the infant's legacy, he may still have recourse to the estate for the deficiency. And it should seem, that even

(*k*) Lloyd v. Baldwin, 1 Ves. 173.

(*l*) Sowarsby v. Lacy, 4 Madd. 142; Lavender v. Stanton, 6 Madd. 46.

a court of equity cannot, in a case of this nature, bind the right of an infant (*m*).

9. It appears to be thought by the Profession, that although the trusts are defined, yet that payment to the trustees is sufficient, wherever the money is not merely to be paid over to third persons, but is to be applied upon trusts which require time and discretion, as where the trust is to lay out the money in the purchase of estates.

And it now appears that this point was decided as far back as in 1792 (*n*), where in a settlement of real estates with a power of sale, the trustees were to receive the purchase-money, and to lay it out again in lands to the uses of the settlement, and till that was done to invest it in government funds, &c. It was objected that a good title could not be made, as there was no clause that the trustees receipts should be good discharges. The Lord Chancellor said: As to the power which the trustees have of giving a discharge, it is true, that when land is to be sold, and a particular debt is to be paid with it, the purchaser is bound to see to the application of the purchase-money. But in cases where the application is to a payment of debts generally, or to a general laying out of the money, he knew of no case which lays down, or any reasoning in any case which goes the length of saying that a purchaser is so bound; and therefore he conceived that the receipt of the trustees would be a good discharge in this case.

In a recent case, where the trust was to pay the money amongst creditors, who should come in within eighteen months, the estate was sold after that time had elapsed, and Sir William Grant, Master of the Rolls, held, that the

(*m*) *Dickenson v. Dickenson*, 3 Bro. C. C. 19.

(*n*) *Doran v. Wiltshire*, 3 Swanst. 699.

receipt of the trustees was a good discharge (o). The deed, he observed, very clearly conferred an immediate power of sale, for a purpose that could not be immediately defined, viz. to pay debts which could not be ascertained until a future and distant period. It was impossible to contend that the trustees might not have sold the whole property at any time they thought fit, after the execution of the deed; and yet it could not be ascertained, until the end of eighteen months, who were the persons among whom the produce of the sale was to be distributed. If the sale might take place at a time when the distribution could not possibly be made, it must have been intended that the trustees should, of themselves, be able to give a discharge for the produce; for the money could not be paid to any other person than the trustees. It is not material that the objects of the trust might have been actually ascertained before the sale. The deed must receive its construction as from the moment of its execution. According to the frame of the deed, the purchasers were or were not liable to see to the application of the money; and their liability could not depend upon any subsequent event. Another ground relied upon in this case, was, that the creditors were parties to the deed, and it was clearly intended that the trustees should receive and apply the money.

10. So where the trust is to lay out the money in the funds, &c. upon trusts, if the purchaser see it invested according to the trust, and procure the trustees to execute a declaration of trust, he is in practice considered as discharged from the obligation of seeing to the further application of the money.

This appears to have been the settled practice in Mr. Booth's time; for in answer to a question how far a pur-

(o) *Balfour v. Welland*, 16 Ves. jun. 151.

chaser was, in a case of this nature, bound to see to the application of the purchase-money, he said he was of opinion, that all that would be incumbent on the purchaser to see done in the case, would be to see that the trustees did invest the purchase-money in their own names, in some of the public stocks or funds, or on government securities; and in such case the purchaser would not be answerable for any non-application (after such investment of the money) of any monies which might arise by the dividends or interest, or by any disposition of such funds, stocks or securities, it not being possible that the testator should expect from any purchaser any further degree of care or circumspection than during the time that the transaction for the purchase-money was carrying on; and therefore the testator must be supposed to place his sole confidence in the trustees; and this, he added, was the settled practice in such cases, and he had often advised so much and no more to be done; and particularly in the case of the trustees under the Duchess of Marlborough's will. And in this opinion Mr. Wilbraham concurred (*p*).

11. The same rules respecting the liability of a purchaser to see to the application of the purchase-money appear to apply, whether the estate be devised or conveyed to trustees to sell for payment of debts, &c. or whether it be only *charged* with the debts; although a difference of opinion has prevailed in the Profession on this point.

In a case in Mosely (*q*) it was laid down, that a purchaser should be bound to see to the application of the purchase-money where the debts were only charged on the estate.

(*p*) See 2 vol. Cas. & Opin. 114.

(*q*) Anon. Mose. 96; and see Newell v. Ward, Nels. Cha. Rep. 38.

But in *Elliot v. Merryman* (*r*), the Master of the Rolls decreed otherwise; because, if the contrary rule were holden, no estate could in such cases be sold, except through the medium of the Court of Chancery, which would be productive of the greatest inconvenience.

Lord Chancellor Camden (*s*) appears to have been of the same opinion; and in a late case (*t*) Lord Chancellor Eldon said, that where a man, by a deed or will, *charges* or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application of the purchase-money.

This point may be considered as settled upon principle, as well as authority. For although a mere charge is no legal estate, but only that declaration of intention upon which a court of equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest that will be sufficient for the debts (*u*); yet it is as much a trust, as a direct conveyance or devise to trustees for the same purpose: the only difference is, that in the case of a charge, the trust arises by the construction of equity; whereas in the case of a conveyance or devise, it is produced by the express declaration of the party; and when the trust is *in esse*, it seems wholly immaterial by what means it has arisen.

And where an estate is given to a devisee, he paying the debts, so that the words are sufficient to pass the fee, a purchaser from the devisee cannot be affected by any gift over of the estate, for the devisee has a right to sell to pay the debts, and if the price of the estate is more

(*r*) Barnard Rep. Cha. 78; 2 Atk. 41; Ambl. 189, marg.

(*t*) See 6 Ves. jun. 654. n.

(*u*) See *Bailey v. Ekins*, 7 Ves.

(*s*) See *Walker v. Smalwood*, jun, 323. Ambl. 676.

than will satisfy the debts, the remedy of the devisees over is against the first devisee, and not against the purchaser (*x*).

It seems hardly necessary to remark, that where lands are charged with the payment of annuities, those lands will be liable in the hands of a purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund (*y*).

So where an estate is devised, subject to existing charges, the purchaser must of course see the charges duly paid.

12. But if the sale or mortgage, from the circumstances of the transaction, afford evidence that the money was not to be applied for the debts or legacies, the purchaser or mortgagee will hold liable to the charge (*z*).

13. These are the distinctions which, according to the books, appear to exist in regard to the liability of a purchaser to see to the application of money arising by sale of estates conveyed or devised to trustees upon trust to sell; but the reader must be apprised, that some gentlemen are of opinion, that a purchaser is *in no case* bound to see to the application of purchase-money, *where there is a hand appointed to receive the money*. And it appears that Lord Kenyon, when Master of the Rolls, inclined strongly to the opinion, although he made no decision, that trustees having the power to sell, they must have the power incident to the character, viz. the power to give a discharge (*a*).

And Sir William Grant observed, that he thought the doctrine upon this point had been carried farther than

(*x*) *Dolton v. Hewen*, 6 Madd. 9.

(*z*) *Watkins v. Cheek*, 2 Sim.

(*y*) *Elliot v. Merryman*, *Bar-*
nard. Rep. Cha. 82. See *Wynn*
v. Williams, 5 Ves. jun. 130.

& *Stu.* 199.

(*a*) See 4 Ves. jun. 99.

any sound equitable principle would warrant. Where, he added, the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust of which they have notice; but where the sale is made by the trustee in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power, that is, to give a valid discharge for the purchase-money. But it was not necessary to determine that in the case before his Honor (*b*).

Of those who hold that a purchaser is only liable to see to the application of the money where there is *not* a hand appointed to receive the money, and the trusts of the money are defined, Mr. Powell is the only one whose reasons are before the Profession (*c*). The whole of Mr. Powell's argument (*I*) appears to have been suggested to him, and indeed depends on the case of *Cuthbert v. Baker*. For throughout the many cases which have been referred to in this chapter, the decisions have invariably been pronounced on the distinction between a limited and a general trust; and in no case has the appointment of a hand to receive the money been considered as affecting the question, any further than that it at one time seems to have been thought, that in every case of a mere charge, the purchaser was bound to see to the application of the money. That this was always deemed the true distinction, is evinced by manuscript and printed opinions to that effect, of all the most leading characters in the Profession of the last and present century. So Lord

(*b*) See 16 Ves. jun. 156.

(*c*) See 1 Mortg. 312—330, 4th edition.

(*I*) See the 3d edition of Powell on Mortgages, where the point is not noticed.

Eldon, in condemning the doctrine advanced in *Omerod v. Hardman* (*d*), did not say it was wrong because there was a hand appointed to receive the money (which was the fact), but because the first trust was for payment of debts generally.

Mr. Powell, however, was not singular in his construction of the decree in the case of *Cuthbert v. Baker*. It is well known by the Profession, that Lord Redesdale, who was counsel for Baker, the purchaser, considered the decision in the same light.

The case is thus stated by Mr. Powell :—*A.* made his will (*e*), and thereby directed that all his personal estate (except as therein excepted) should be applied, as far as the same would extend, in payment of debts, legacies, and funeral expenses, and of all annuities by him granted; and if such personal estate should not be sufficient for those purposes, then it was his further will and desire, and he did direct, that the deficiency, whatever it might be, should be paid and made good out of his real estate (except a part therein mentioned, which he did not intend to make subject thereto), and which real estates he charged with the payment of such deficiency, to whose hands soever the same came. And so subject and exempt, he gave, devised, &c. all his real and personal estate in the following manner: certain parts of his estate to his wife in fee; and as to the manors, messuages, &c. not given to his wife in fee, he devised them to his wife for life; and, after her decease, he gave the same to trustees, in trust to sell and to divide and to distribute the money which should arise by such sale between and amongst such child or children of *A. B.* on the body of his then

(*d*) See 6 Ves. jun. 654, n. *et* 1790, Reg. Lib. 4, 441; the correct reference is Lib. Reg. A. 1790, *supra*, n. (I) to s. 4.

(*e*) Mr. P. refers to 4th July fo. 442.

wife begotten ; and such children of *C. D.* (I) as should be living when the devise to the trustees should take effect, equally share and share alike, to take *per capita*, and not *per stirpes* : if but one such child, the estate to be transferred to him, and not to be sold. The wife died. One trustee died in her life-time. The surviving trustee sold the estate by auction. The personal estate was sufficient to discharge the debts : the claimants under the devise to children were seven children of *A. B.*, and six children of *C. D.* (II), who were entitled to the purchase-money in equal shares. One of the children of *C. D.* was in the East Indies, and two were infants. The purchaser refused to complete his purchase, objecting thereto on the ground, that there being no proviso in the will to exonerate the purchaser from seeing to the application of the money, the purchaser was bound to know or find out what children of the persons in that behalf named were living at the testator's wife's death ; for that such children ought individually to execute the conveyance, and give releases for their respective claims ; and that one being in the East Indies, and two being infants, could not join in such conveyance. But the decree was, that the contract should be carried into execution, that the infants shares of the purchase-money should be paid to the Accountant-general, and that the remainder of the purchase-money should be paid to the trustee. The decree proceeded to direct that all proper parties should join in the proper conveyances.

Mr. Powell observes, that this decision, though not final, as it still left room for an application to the Court to

(I) This is mistated, for the money was given to such of the children of *three* persons as should be living at the time when the devise to the trustees should take effect.

(II) This is inaccurate. There were seventeen children in all.

determine who might be proper parties to the conveyance, appeared to him to be conclusive on the question, whether the persons beneficially entitled are necessary parties ; because there could be no ground to consider those persons as necessary parties, unless it were to discharge the purchaser : but there seemed to him to be no power in the Court to compel a person beneficially interested in money to arise by sale of land, to discharge that land, unless it were upon paying or securing the money to him. But the Court, by directing the payment to the trustee, had done that which rendered a direction to pay to the *cestui que trust* impossible.

It will be seen that Mr. Powell's argument is entirely founded on the order to pay the remainder of the purchase-money to the trustee, and this ground wholly fails him ; *for all the cestuis que trust were plaintiffs, and the prayer of the bill was, that the infants shares might be invested, and that the remainder of the purchase-money might be paid to the trustee.*

It is not noticed in the foregoing statement of the case, that no costs were given ; but the fact is, that the purchaser was refused his costs, and that circumstance may perhaps induce a conclusion, that the construction put upon the case by Mr. Powell is correct.

But it is conceived, that there is a ground upon which the decision may be supported without impeaching the settled doctrine on this subject. The trust was for *such* of the children of three persons as should be living when the estate should fall into possession, and it was strongly insisted by the bill, and, it is apprehended, with great reason, that the *cestuis que trust* were in regard to the purchaser undefined ; and he was not bound to ascertain or inquire how many there were, and who they were. The facts of the case were such as to tempt a Judge to

put that construction on the trust; there were seventeen children, two of whom were infants, and another was in the East Indies. It should seem, therefore, that there is a solid principle to which Lord Thurlow's decision can be referred, and, consequently, a purchaser can scarcely be advised to incur the risk of paying money to a trustee, on the authority of this case, in opposition to the former decisions. Perhaps another ground remains upon which the decision might have been made. All the *cestuis que trust* of age, and in the kingdom, offered, previously to the commencement of the suit, to give receipts for their shares: the receipt of the trustee would certainly have been a sufficient discharge for the shares of the infants, and also, as it is conceived, for the share of the *cestui que trust*, who was abroad. And in this view of the case the purchaser was clearly liable to the costs. It were difficult to maintain, that the absence of a *cestui que trust* in a foreign country shall, in a case of this nature, impede the sale of the estate. Lord Thurlow's judgment in this case would be a very desirable present to the Profession. In a case which came before the same Judge a few years before that of Cuthbert *v.* Baker, and which I learn from a gentleman who has seen the papers relating to the estate, is correctly reported, the estate was subjected to the payment of debts generally; and his Lordship said, that the purchaser was a mere stranger, and was not bound to look to the application; *where the estate is to be sold, and a specific sum, as 5 l., to be paid to A. the purchaser must see to the application*; but where it is to be sold generally, he is not (*f*).

In the Case of Curren *v.* Walkley, reported in Mr. Dickens's second volume (*g*), which was also before Lord Thurlow, it is stated, that the testator had devised estates,

(*f*) Smith *v.* Guyon, 1783, 1 Bro. C. C. 116. (g) 2 Dick. 649.

subject to particular charges : he afterwards entered into a contract for a part of the estate, and the purchaser paid the sum of 600 *l.* as a deposit. The bill was for an account of what was due to the plaintiff in respect to his charge, and that the purchaser might pay out of the remainder of his purchase-money what remained due to the plaintiff. Lord Chancellor Thurlow is reported to have said, that if an estate is devised to trustees to sell, and the testator afterwards contracts for the sale of the estate, it is enough for the purchaser to pay the purchase money into the hands of the trustees, to apply it, as it doth not lie with him to see it applied ; but if the estate be devised, subject to particular charges, it is incumbent on him to see it applied in payment of those particular charges.

This case seemed to apply to the point under discussion ; but no reliance could be placed upon it, as it was to be inferred from the report, that Lord Thurlow held, that a devise of an estate was not revoked in equity by a subsequent contract for sale of it—a doctrine which it was difficult to suppose could have fallen from so great a Judge.

The case is stated in the Registrar's book (*h*), by the name of *Comer v. Walkley*, and Mr. Dickens's report of it is a complete mis-statement. The estate was originally devised to trustees upon trust, to sell and pay debts generally. The estate was subject to an annuity at the death of the testator. The trustee sold a part of the estate for 720 *l.*, 600 *l.* was left in the purchaser's hand as an indemnity against the annuity. The purchaser afterwards paid 250 *l.*, part of the 600 *l.*, to the trustee. By several conveyances, &c. the estate purchased became again vested in trustees upon trust, to sell for payment of debts generally.

(*h*) Reg. Lib. A. 1784, fol. 625.

These trustees sold the estate to Charles Whittard, who objected to complete the contract without the concurrence of the person entitled to the residue, then unpaid, of the 600*l.* After a great lapse of time the person entitled to the residue of the 600*l.* filed a bill against Whittard and others for payment of it; and Whittard filed another bill for a specific performance, which was accordingly decreed; and the proper accounts were directed to be taken in the first cause. Whittard's costs in both causes were allowed to him. The decision, therefore, appears to have been, that the 600*l.* was a lien on the land. The latter part of Lord Thurlow's judgment, reported by Dickens, clearly referred to the annuity, which was a subsisting charge on the estate at the testator's death. And advert- ing to the circumstances of the case, the first part of the judgment may, perhaps, be read thus: If an estate is devised to trustees to sell, and the *trustees* afterwards con- tract for the sale of the estate, it is enough for the pur- chaser to pay the purchase-money into the hands of the trustees to apply it, as it doth not lie with him to see it applied. Now this, as corrected, seems in favour of the opinion, that where a hand is appointed to receive the money, a purchaser is not bound to see to the application of the purchase-money; but it should not be forgotten, that this observation was made in a case where the trust was for payment of debts generally.

14. Where the trust is to raise so much money as the personal estate shall prove deficient in paying the debts, or debts and legacies, it seems formerly to have been doubted whether the purchaser was not bound to ascer- tain the deficiency. Mr. Fearne thought a purchaser was bound to do so (*i*). But the opinion of the Profession is certainly otherwise (*k*). Indeed, a direction that the per-

(*i*) Fearne's Posthuma, p. 121.

(*k*) See the 12th section of Mr. Butler's n. (1) to Co. Litt. 209 b.

sonal estate shall be first applied, only expresses the rule of equity, where, as in a case of this nature, no intention appears to exonerate the personalty from the payment of the debts; and, therefore, such a direction cannot be deemed material.

15. Where a *mere power* is given to trustees to sell, for the purpose of raising as much money as the personal estate shall prove deficient in paying the debts, or debts and legacies, it seems that unless the personal estate be actually deficient, the power does not arise, and consequently cannot be duly executed. This was expressly decided in the case of *Dike v. Ricks* (*l*), where, in a case of this nature, it was determined by Jones, Croke and Barkeley, Justices, unanimously, that the condition was a precedent condition, and that the performance of it ought to be sufficiently averred, otherwise the power would not authorize a sale; and that the amount of the debts, and the value of the personal estate, ought to be shown, so that the Court might judge whether the condition was performed or not; and also that so much only of the estate could be sold as was sufficient for payment of the debts. And the case of *Culpepper v. Aston* (*m*), also appears to be an authority, that in a case of this nature a purchaser is bound to ascertain the deficiency; for in that case the will seems to have given a *mere power* (*n*) to the executors to raise as much money as the personal estate should fall short in paying the debts. The will was revoked *pro tanto* by a subsequent conveyance creating a direct trust to sell and pay debts, under which it seems the purchaser bought; and therefore the point did not call for a decision. But it was resolved, that by the trust (that is, power,) in the will to sell, the purchaser did purchase at

(*l*) Cro. Car. 335; Wm. Jones, 327; 1 Ro. Abr. 329, pl. 9; 3 Vin. Abr. 419, pl. 9.

(*m*) See 2 Cha. Ca. 221.

(*n*) 2 Cha. Ca. 115.

his own peril, if the personal estate received were sufficient ; but that if the trust were as in the deed, the purchaser was safe.

The reader must be aware, that as the power is not well executed, unless there be a deficiency, a purchaser must, at his peril, ascertain the fact, notwithstanding that the trust be for payment of debts generally ; or being for payment of particular debts or legacies, the *common clause*, that the trustees receipts shall be sufficient discharges, be inserted in the instrument creating the trust.

Wherever, therefore, a power of this nature is given, and even where a trust for such purposes is raised, it seems advisable, as Mr. Butler remarks, to extend this clause a degree farther, by expressly discharging the purchaser or mortgagee from the obligation of inquiring, whether the personal estate has been got in and applied ; and by expressly authorizing the trustees to raise any money they may think proper by sale or mortgage, though the personal estate be not actually got in or applied. For it frequently happens, that the getting in of the personal estate is attended with great delay and difficulty ; during which the real estate cannot perhaps be resorted to. This will be obviated effectually by inserting a clause to the above effect. It should, however, be accompanied with a further direction, that so much of the personal estate, and the money raised under the trust, as shall remain after answering the purposes of the trust, shall be laid out in land, to be settled on the devisees of the real estates (o).

16. Where a purchaser is bound to see the money applied according to the trust, and the trust is for payment of debts, or legacies, he must see the money actually paid to the creditors or legatees.

(o) Butler's n. (1) to Co. Litt. 290 b.

In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one. Or, if the creditors or legatees are but few, they may be made parties to the conveyances.

Another mode by which the purchasers may be secured is, an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges; and then the trustee can be made a party to the several conveyances.

Sometimes a bill is filed for carrying the agreement into execution, when the purchase-money is of course directed to be paid into court; and this is the surest mode, because the money will not be paid out of court without the knowledge of the purchaser.

17. If the names of the trustees be inserted in the usual clause, that the receipts of the trustees shall be discharges, every trustee who has accepted the trust must join in the receipt for the purchase-money, although he may have released the estate to the other trustees (*p*); because, notwithstanding that he release the legal estate to his co-trustees, he cannot delegate the personal trust and confidence reposed in him; for the rule is, *delegatus non potest delegare*.

To obviate this difficulty, which frequently occurs, it might, perhaps, be advisable (instead of naming the trustees in the clause) to say, that the receipts "of the trustees or trustee, for the time being, acting in the execution of the trusts hereby created," shall be sufficient discharges. This would probably render it unnecessary for a trustee who had released the estate to join in any receipt:—there could not be the slightest ground to con-

(*p*) *Crewe v. Dicken*, 4 Ves. jun. 97. See *post*.

tend, that any personal trust or confidence was given to the trustees named in the instrument creating the trust ; and therefore the receipt of the trustees acting in the trusts, for the time being, would satisfy as well the words as the spirit of the clause (*q*).

18. But as one man cannot impose a trust on another against his consent, a trustee who has refused to accept the trust, and actually renounced, need not join in any receipts ; in such cases the receipts of the other trustees will be sufficient discharges (*r*). And it seems, that where there is a release instead of a disclaimer, yet if the operation of the act is disclaimer the release must be considered as a disclaimer (*s*). This of course cannot apply to any case where the trustee has acted in execution of the trusts, for the estate is then vested in him, and it is too late to disclaim.

19. Where an estate is devised or conveyed to trustees to sell for payment of debts generally, without a clause that their receipts shall be discharges, and they convey to a third person, *for the purposes of the trust*, sales made by him are as effectual as sales made by the trustees themselves, and his receipt is equally a discharge to a purchaser (*t*) ; because, in such cases, the receipt is effectual by reason of the trust itself, and not owing to any personal confidence given by the author of the trust, or to any express declaration by him for that purpose.

(*q*) See Co. Litt. 113 a.

(*r*) See Sir William Smith *v.* Wheeler, 1 Ventr. 128 ; Hawkins *v.* Kemp, 3 East, 410 ; Adams *v.* Taunton, 5 Madd. 435.

(*s*) Nicolson *v.* Wordsworth, 2 Swanst. 365.

(*t*) Hardwicke *v.* Mynd, 1 Anstr. 109. See *Ld. Braybroke v. Inskip*, 8 Ves. jun. 417 ; *sed qu.*

SECTION II.

Of this Liability, with reference to Leasehold Estates.

1. WE have already seen, that however leasehold estates may be bequeathed, they must go to the executors, to be applied, in the first place, in a due course of administration, which is tantamount to a bequest for payment of debts generally. And, therefore, in analogy to the decisions upon devises of real estates for a similar purpose, it is incontrovertibly settled, that a purchaser of personalty shall in no case be bound to see to the application of the purchase-money where he purchases *bonâ fide*, and without notice that there are no debts (*u*).

This principle was adhered to in the case of *Humble v. Bill* (*x*), before Sir Nathan Wright, where a man bequeathed a specific part of his personalty upon trust to raise a sum of money for his daughter, and the executors mortgaged it, pretending want of assets. The decision was, however, reversed in the House of Lords (*y*); but the reversal is generally supposed to have proceeded from proof of fraud, and has not been attended to in subsequent cases.

Thus, in *Ewer v. Corbet* (*z*), it was expressly holden, that a term being bequeathed to A. did not prevent the executors from selling it; and that notice of the devise was nothing, as every person buying of an executor necessarily must have such notice. And the Master of

(*u*) *Elliot v. Merryman*, Barnard. Rep. Cha. 78; 2 Atk. 41. See *Watts v. Kancy*, Toth. 141; S. C. *ibid.* 227, by the name of *Mutts v. Kancie*; and *Nurton v. Nurton*, *ibid.*

(*x*) 2 Vern. 444; 1 Eq. Ca. Abr. 358, pl. 4.

(*y*) See *Savage v. Humble*, 1 Bro. P. C. 71; and see 17 Ves. jun. 160, 161.

(*z*) 2 P. Wms. 148; and see *Burting v. Stonnard*, 2 P. Wms. 150; and *Andrew v. Wrigley*, 4 Bro. C. C. 137; and *Dickenson v. Lockyer*, 4 Ves. jun. 36.

the Rolls said, he remembered it to have been once ruled, that an executor could not make a good title to a term to a purchaser, and that was in the case of *Bill v. Humble*; but since that he took it to have been resolved, and with great reason, that an executor, where there were debts, might sell a term; and the devisee of the term had no other remedy but against the executor to recover the value thereof, if there were sufficient assets for the payment of debts.

2. This doctrine has been carried so far, that a sale in satisfaction of a private debt of the executor has been holden good (*a*).

But in the first authority on this head (*b*), it appears that the testator had been dead two years before the assignment, although that circumstance is not mentioned in the report (*c*); and it might, therefore, be supposed, that the executor might in that case have entitled himself to the term, on account of advances made by him in his trust (*d*); and it also appears that he was sole residuary legatee (*e*). On the former ground alone, the decision perhaps cannot be supported; for Lord Thurlow decided differently in a case nearly similar, although between three and four years had elapsed from the death of the testator to the transaction (*f*).

With respect to the second authority on this head (*g*), Lord Kenyon expressly dissented from it in the case of *Bonney v. Ridgard* (*h*); and in a late case (*i*), where an

(*a*) *Nugent v. Gifford*, 1 Atk. 2 Bro. C. C. 431; and see 17 Ves. 463; and *Mead v. Lord Orrery*, jun. 164.

3 Atk. 235; and see *Ithell v. Beane*, 1 Ves. 215.

(*b*) *Nugent v. Gifford*.

(*c*) See 4 Bro. C. C. 136.

(*d*) See 7 Ves. jun. 107.

(*e*) See 17 Ves. jun. 163.

(*f*) *Scott v. Tyler*, 2 Dick. 724;

(*g*) *Meade v. Lord Orrery*.

(*h*) 2 Bro. C. C. 433; 4 Bro. C. 130; 7 Ves. jun. 167, cited; and see *Andrew v. Wrigley*, 4 Bro. C. C. 125.

(*i*) *Hill v. Simpson*, 7 Ves. jun.

152; and see *Lowther v. Lowther*,

executor, shortly after the decease of his testatrix, transferred stock, part of her estate, to his bankers, to secure a debt due from him, and future advances, the bankers swore that they did not know or suspect, that the funds were not the property of the executor, either as executor or devisee; and it appeared in evidence, that he represented himself as absolutely entitled to them, under the will, subject to a trifling annuity, and a few small legacies; although no fraud was proved, yet as gross negligence appeared in the bankers not inspecting the will, the funds were holden to be liable to the legacies given by the will.

It seems clear, therefore, that an executor cannot now dispose of his testator's property, as a security for, or in payment or satisfaction of his own debts.

In a late case, however, where, a considerable time after the death of the testator, part of the assets were pledged with bankers as a security for monies advanced at the time, and future advances to the two acting executors; a bill filed by co-executors, who had not acted in the affairs of the testator, for delivery up of the assets, was dismissed, but without deciding what the equity would be if the title was nothing more than deposit, and the bill had been filed by a legatee (*k*).

3. If the executor sell at an undervalue, or to one who has notice that there are no debts, or that all the debts are paid (*l*), or if there be any express or implied fraud or collusion between the executor and purchaser, the sale cannot be supported (*m*).

13 Ves. jun. 65; 17 Ves. jun. 169;
and Cubbidge v. Boatwright, 1
Russ. 549.

(*l*) See Ewer v. Corbet, 2 P.
Wms. 148.

(*k*) M'Leod v. Drummond, 14
Ves. jun. 353; 17 Ves. jun. 152;
and see Farr v. Newman, 4 Term
Rep. 621; Keane v. Roberts, 4
Madd. 332.

(*m*) Crane v. Drake, 2 Vern.
616; Vin. 43, pl. 13; 18 Vin. 121,
pl. 11, side notes; Bonney v. Rid-
gard, 2 Bro. C. C. 438, cited;
Nugent v. Gifford, 1 Atk. 463; and
see Gilb. Eq. Rep. 113; Prec. Cha.

Fraud and covin will vitiate any transaction, and turn it to a mere colour. If one concert with an executor, or legatees, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in *any other manner*, (which Lord Eldon has said, are very material words) (*n*), contrary to the duty of office of executor, such concert will involve the seeming purchaser, and make him liable for the full value (*o*).

4. But if the legatee permit a long time to elapse without asserting his claim, and there are several mesne purchasers, equity will not set aside the sale, although there are suspicious circumstances of fraud (*p*).

5. And although the legatee has only a contingent interest, yet that will be no excuse for delay (*q*); because he has such an interest as will entitle him to know what debts the testator owed, and what part of his estate has been applied to the payment of them. And in *Howorth v. Powell*, it was laid down by Lord Keeper Henley, that a party having a claim in remainder to an estate, though not to the possession, if he sees the possession wrongfully usurped, ought to file his bill for relief before his right to possession accrues: for otherwise he stands by and countenances the possessor in his exercise of acts of ownership (*r*).

6. It remains to observe, that Lord Hardwicke thought (*s*) the reversal of the case of *Humble v. Bill* (*t*)

434; and *Whale v. Booth*, 4 Term Rep. 625, n.

(*n*) 17 Ves. jun. 167.

(*o*) *Per* Lord Thurlow, 2 Dick. 725; and see 1 Burr. 475.

(*p*) *Bonney v. Ridgard*, 2 Bro. C. C. 438; 17 Ves. jun. 97, cited; and see 17 Ves. jun. 165.

(*q*) *Andrew v. Wrigley*, 4 Bro. C. C. 125.

(*r*) Ch. T. T. 1758, MS.; 1 Eden, 351, nom. *Howarth v. Deem*.

(*s*) See *Mead v. Lord Orrery*, 3 Atk. 241; and see 17 Ves. jun. 161, 162.

(*t*) *Supra*, p. 546.

might be proper, because the charge was upon a *particular part* of the estate : his Lordship not, however, meaning to impugn the general doctrine, which he frequently admitted, and indeed carried farther than any other Judge.

This distinction Lord Hardwicke appears to have been inclined to follow in a case (*u*) where a specific legatee of a mortgage brought a bill to foreclose against the representative of the mortgagor, who pleaded an account settled between him and the executor of the mortgagee, and a release. For his Lordship thought the devisee had a specific lien on the estate, and as the mortgagor had notice of the bequest he was bound by it. And he was inclined to overrule the plea of the release ; but the case of *Ewer v. Corbet* (*x*) being cited, it was ordered to stand for an answer, with liberty to except. The case was afterwards debated on several days, and the Chancellor ultimately determined, that the plaintiff had not equity sufficient to support his bill, and accordingly dismissed it, but without costs (*y*).

Upon principle as well as upon the authority of *Langley* and *Lord Oxford*, the better opinion clearly is, that a particular chattel specifically bequeathed may be purchased from an executor, but certainly, in most cases, such a purchase could not be recommended without the concurrence of the legatee, because, independently of the general question, the executor may have assented to the bequest (*z*).

7. But of course this question cannot arise where the specific legatee of the chattel is also executor (*a*).

(*u*) *Langley v. Earl of Oxford*, Ambl. 17 ; and see *Elliot v. Mer-ryman*, Barnard. Ch. Rep. 78 ; and *Andrew v. Wrigley*, 4 Bro. C. C. 125.

(*x*) *Supra*, p. 556.

(*y*) See Reg. Lib. B. 1747, fol. 300.

(*z*) See *Thomlinson v. Smith*, Rep. temp. Finch, 378.

(*a*) *Taylor v. Hawkins*, 8 Ver. jun. 209.

CHAPTER XII.

OF THE VENDOR'S LIEN ON THE ESTATE SOLD FOR THE PURCHASE-MONEY, IF NOT PAID.

I. WHERE a vendor delivers possession of an estate to a purchaser, without receiving the purchase-money, equity, whether the estate be (*a*) (I) or be not (*b*) conveyed, and although there was not any special agreement for that purpose, gives the vendor a lien on the land for the money ; so, on the other hand, if the vendor cannot make a title, and the purchaser has paid any part of the purchase-money, it seems that he has a lien for it on the estate, although he may have taken a distinct security for the money advanced (*c*) (II).

And even where the agreement itself provides for the security of the purchase-money, by a bond to remain at interest during the purchaser's life, the seller will not lose his lien. The case was held not to be distinguishable from the common case of an agreement, made after the

(*a*) *Chapman v. Tanner*, 1 Vern. 267 ; *Pollexfen v. Moore*, 3 Atk. 272 ; and see 1 Bro. C.C. 302, 424 ; and 6 Ves. jun. 483 ; *Mackreth v. Symmons*, 15 Ves. jun. 329. (*b*) *Smith v. Hibbard*, 2 Dick. 730 ; *Charles v. Andrews*, 9 Mod. 152. (*c*) *Lacon v. Mertins*, 3 Atk. 1.

(I) But note, that in *Chapman v. Tanner* (see *Ambl.* 726 ; 6 Ves. jun. 757), and *Pollexfen v. Moore*, there were special agreements that the vendor should keep the writings. Indeed, in the latter case, possession had not been delivered. See Mr. Sanders's note to the case in his edition of *Atkins*.

(II) As to chattels capable of delivery, as timber felled, see *ex parte Gwyne*, 12 Ves. jun. 379.

written agreement, to take a bond (*d*). But this point, upon the case again coming on, was decided the other way, and the lien was held not to exist (*e*). Upon appeal, the Lord Chancellor reversed the latter decision, and from his decision an appeal to the House of Lords is now depending.

A stipulation that the purchase-money should be repaid within two years *after a resale*, was held to discharge the vendor's lien (*f*).

But equity will not raise this equitable lien in favour of a papist incapable of purchasing (*g*), for that would give him an interest in land.

If a vendor take a distinct and independent security for the purchase-money, his lien on the estate is gone ; such a security is evidence that he did not trust to the estate as a pledge for his money (*h*).

Thus, upon the sale of an estate, the vendor accepted some stock for the money (*i*), with an agreement, that in case it did not within a limited time produce a sum named, the purchaser should make it up that sum. The stock proved deficient ; and Sir William Grant held, that the vendor had no lien on the estate for the deficiency : he thought that the vendee could not have any motive for parting with his stock, but to have the absolute dominion over the land. It was impossible, his Honor said, that it could be intended that the vendor should have this double security, an equitable mortgage and a pledge, which latter, if the stock should rise a little, would be amply sufficient to answer the purchase-money.

(*d*) *Winter v. Lord Anson*, V.C. 27 Nov. 1821, MS.

(*e*) 1 Sim. & Stu. 434.

(*f*) *Ex parte Parkes*, 1 Glyn & Jam. 223.

(*g*) *Harrison v. Southcote*, 2 Ves. 339. See now 10 Geo. 3.

(*h*) See 6 Ves. jun. 483 ; and see the observations of Lord Eldon on this case in 15 Ves. jun. 348, 349.

(*i*) *Nairn v. Prowse*, 6 Ves. jun. 752 ; but see Lord Eldon's observations, *post*.

And the same rule must, it has been said, prevail where a vendor accepts a mortgage of another estate for the purchase-money, the obvious intention of burthening one estate being, that the other shall remain free and uncumbered (*k*); so, even where the vendor takes a mortgage of the estate sold for only part of the purchase-money; because, by taking a mortgage for part, he clearly evinces his election, that the estate should be charged with that part only (*l*).

Lord Eldon, however, has said, that it did not appear to him a violent conclusion as between vendor and vendee, that notwithstanding a mortgage, the lien should subsist (*m*). It must not, he added, be understood, that a mortgage taken is to be considered as a conclusive ground for the inference, that a lien was not intended, as he could put many instances, that a mortgage of another estate for the purchase-money, would not be decisive evidence of an intention to give up the lien, though in the ordinary case, a man has always greater security for his money upon a mortgage, than value for his money upon a purchase; and the question must be, whether, under the circumstances of that particular case, attending to the worth of that very mortgage, the inference arises. In the instance of a pledge of stock, does it necessarily follow that the vendor, consulting the convenience of the purchaser, by permitting him to have the chance of the benefit, therefore gives up the lien which he has? The doctrine, as to taking a mortgage or pledge, would be carried too far, if it is understood as applicable to all cases, that a man taking one pledge, therefore necessarily gives up another, which must, his Lordship thought, be

(*k*) See *Nairn v. Prowse*; but see 15 Ves. jun. 341; 2 Ball & Beat. 515.

(*l*) *Bond v. Kent*, 2 Vern. 281.

See 1 Scho. & Lef. 135.

(*m*) See 15 Ves. jun. 341; and see *Cowell v. Simpson*, 16 Ves. jun. 278, 280.

laid down upon the circumstances of each case, rather than universally (*n*).

But it seems, that taking a covenant, bond or note, for the purchase money, will not affect the vendor's lien.

This was settled by the case of *Hearne v. Botelers* (*o*), where a bond was taken for the money, and some of it remained unpaid, and the bond was lost; for the opinion of the Court was to charge the defendants, *in regard of the land in their possession*, with the payment thereof; on the ground, it should seem, that taking a bond did not deprive the vendor of his equitable lien; for unless he had such a lien, the loss of the bond would hardly be a ground to charge the money on the estate (*p*).

So, in *Gibbons v. Baddall* (*q*), it was said, that if *A* sells an estate, and takes a promissory note for part of the purchase-money, and then the purchaser sells to *B*, who has notice that *A* had not received all his purchase-money, the land in equity is chargeable in the hands of *B*, with the money due on the note. In this case, therefore, the existence of the equitable lien was considered as a point perfectly settled.

But in *Fawell v. Heelis* (*r*), where a receipt was indorsed on the deed for the purchase-money (*I*), although it was not actually paid, and the vendor took a bond for the purchase money, Lord Bathurst held that he had

(*n*) *Mackreth v. Symmons*, 15 Ves. jun. 348, 349. 343, *per* Lord Eldon.

(*o*) *Cary's Rep.* Cha. 25; and see *Tardiff v. Scrughan*, 1 Bro. C. C. 422, cited; and *Harrison v. Southcote*, 2 Ves. 389. (*q*) 2 Eq. Ca. Ab. 682, n. (b) to (D.); *Ex parte Peake*, 1 Madd. 346.

(*r*) *Ambl.* 724; 1 Bro. C. C. 421, n.; 2 Dick. 485.

(*p*) But see 15 Ves. jun. 338,

(*I*) This of course could not make any difference in the case, for a receipt for the purchase money, although signed by the seller, is in equity of no avail if the money be not actually paid. See *Coppin v. Coppin*, 2 P. Wms. 291; but at law the receipt cannot be got over,

thereby departed with his lien. He said, he did not find an instance where a bond had been taken for the consideration-money (*s*). It was evident the vendor had an opinion of the purchaser at the time, otherwise he would not have let the money remain in his hands. I consider it, he added, as a transaction distinct, and independent of the purchase: he lends him the money, and he chooses his security, and I think he must abide by it; therefore let the bill be dismissed.

In a subsequent case (*t*), however, Lord Rosslyn was decidedly of opinion against the doctrine laid down by Lord Bathurst. After commenting on other cases, he said, the case of Fawell and Heelis remained; there Lord Bathurst doubted whether there was such an equitable lien; it became, therefore, of great consequence that it should be spoken to. It struck him always, he said, that there was such a lien, and that it was so from the foundation of the court. A bargain and sale must be for money paid. If an estate is sold, and no part of the money paid, the vendee is a trustee: then, if part be paid, was it not the same as to that which was unpaid?

In the late case of *Nairn v. Prowse* (*u*), the Master of the Rolls seemed to incline to the same opinion. He said, that by conveying the estate without obtaining payment, a degree of credit was necessarily given to the vendee. That credit might be given upon the confidence of the existence of such a lien. The knowledge of that

(*s*) *Vide* *Heale v. Botelers*, and *Gibbons v. Baddall*, *ubi supra*.

Tardiffe v. Scrugan, *ibid.* 423, cited; and 15 Ves. jun. 336, 337.

(*t*) *Blackburn v. Gregson*, 1 Cox, 90; 1 Bro. C. C. 420; and see

(*u*) 6 Ves. jun. 752.

Rowntree v. Jacob, 2 Taunt. 141, unless merely fraudulent, *Henderson v. Wild*, 2 Campb. 561; see *Lampon v. Corpe*, 5 Barn. & Ald. 606; and in equity payment will be presumed after a great length of time, *Bidlake v. Arundel*, 1 Cha. Rep. 93.

might be the motive for permitting the estate to pass without payment. Then it may be argued, that taking a note or bond cannot materially vary the case. A credit is still given to him, and may be given from the same motive; not to supersede the lien, but for the purpose of ascertaining the debt, and countervailing the receipt indorsed upon the conveyance.

And in a case where a receipt was given for the whole purchase money, but part was retained, and a promissory note given for it to a trustee for the vendor, there being debts affecting the estate, the amount of which was not ascertained, Lord Redesdale held, that it lies on the purchaser to show that the vendor agreed to rest on the collateral security; *prima facie* the purchase-money is a lien on the lands. In this case, his Lordship said, that the purchaser's note was nothing but a mere memorandum, put into the hands of a trustee, to enable the purchaser first to pay off incumbrances, and then to be subject to an account, and the balance only to be received by the vendor. It cannot be considered that the vendor relied on it *as a security*. Suppose bills given as part of the purchase-money, and suppose them drawn on an insolvent house, shall, his Lordship asked, the acceptance of such bills discharge the vendor's lien? They are taken, he added, not as a security, but as a mode of payment (*x*).

And in a late case, where the purchase-money was paid by bills drawn by the purchaser and accepted by him *and his partner*, payable to the seller's order, Sir Wm. Grant, Master of the Rolls determined that the lien was not gone (*y*). It was insisted, that by taking bills accepted by the partnership, the vendor got the security of a third person, which must be considered as a substitution for the

(*x*) *Hughes v. Kearney*, 1 Scho. & Lef. 132.

(*y*) *Grant v. Shills*, 2 Ves. & Bea. 306.

lien. His Honor observed, that what might be the effect of a security, properly so denominated, of a third person, had never, he believed, been absolutely determined; but he perfectly concurred in the opinion expressed by Lord Redesdale in *Hughes v. Kearney* (z), that bills of exchange are to be considered not as a security, but merely as a mode of payment. That is obvious from attending to the nature of a bill of exchange; it is an order by the drawer for the payment of money which he has in the hands of the drawee to the holder of that bill. The acceptor, by his acceptance, acknowledges that he has money belonging to the drawer in his hands, and engages to have that money forthcoming according to the requisition of the bill. The acceptor is never considered as a surety for the debt of another. By accepting he admits himself to be a debtor to the drawer. The subject of the bill is, in contemplation of law, the drawer's own money, which he authorizes the creditor to receive instead of receiving it himself, and afterwards handing it over to such creditor.

And in such cases it is not important that the note or bill has been negotiated (a).

The same point seems to have been decided in *Comer v. Walkley* (b). A trustee sold an estate for 720 l. : 600 l. was left in the purchaser's hands as an indemnity against an annuity; and a deed was entered into between him and the trustee, whereby he covenanted to pay interest on the 600 l. and when the annuity should cease or be discharged, to pay the money to the trustee. By several conveyances, &c. the estate became again vested in trustees, upon trust to sell; and they sold the estate to a purchaser, who objected to complete his contract without

(z) 1 Scho. & Lef. 132. See 136.

(b) Reg. Lib. A. 1784, fol. 625; *vide supra*, p. 540.

(a) *Ex parte Loaring*, 2 Rose, 79.

the concurrence of the person entitled to the residue of the 600*l.* then unpaid. Two bills were filed, one by the person entitled to the residue of the 600*l.* against the purchaser and others, for payment of it; and the other by the purchaser, who had been in possession twenty-two years for a specific performance, which was accordingly decreed, and his costs in both causes were allowed. The proper accounts of the personal estate were directed to be taken in the first cause, but the question, out of what estates any deficiencies should be made good, was reserved: so that it does not appear that the Court held the money to be a lien on the land any further than by giving the purchaser his costs in both causes; which circumstance alone is, however, conceived to be decisive. And the question has received the same decision in a recent case before Lord Eldon, after an elaborate review of all the authorities (*c*).

Upon the whole, therefore, it seems quite clear, that taking a covenant, bond or note, for the purchase-money, or any part of it, will not discharge the vendor's equitable lien on the estate. And it seems that the same rule must prevail although the estate is sold for an *annuity*, and a covenant, bond or note is taken for securing the payment of it (*d*).

In *Elliot v. Edwards* (*e*), the vendor assigned a leasehold estate to the purchaser, upon payment of part of the purchase-money. The purchaser, and another person as his surety, covenanted for payment of the residue of the purchase-money; and in the assignment was contained a

(*c*) *Mackreth v. Symmons*, 15 Ves. jun. 329. The case was afterwards reheard by Lord Chancellor Eldon, with the assistance of two Judges, but judgment was not given.

(*d*) See *Tardiffe v. Scrughan*, 1 Bro. C. C. 423, cited; but see *Mackreth v. Symmons*, 15 Ves. jun. 329, which, however, was a very particular case.

(*e*) 3 Bos. & Pull. 181.

proviso, that the estate should not be assigned until all the money was duly paid, without the joint consent of the vendor and the surety. Lord Alvanley was of opinion, that the vendor had an equitable lien, and that till the money was paid, equity would not compel a specific performance of any agreement by the assignee for sale of the estate. But if a third person advance part of the purchase-money to the vendor, and he is in effect made a mortgagee of the estate, his right will prevail over the vendor's lien (*f*).

In *Blackburn v. Gregson* (*g*), Lord Rosslyn, as we have seen, said, that if an estate is sold, and no part of the money paid, the vendee is a trustee : from which it might perhaps be inferred, that a vendor has always an equitable lien where *no part* of the purchase-money is paid : but this cannot be considered as a general rule ; it being clear, that a vendor may depart with his lien, although no part of the purchase-money be paid. Indeed the same rules seem to prevail on this subject, whether the whole, or only part of the purchase money, remains unpaid.

Where a security by bond or note is given for the purchase-money, and it is intended that the vendor shall not have a lien on the estate for the money, a declaration to that effect should be inserted in the conveyance ; which would effectually prevent equity from raising a lien upon the *presumed* intention of the parties.

II. It must be remarked, that although equity raises this lien in favour of a vendor, yet it is not extended to third persons ; that is, where the vendor is satisfied out of the personal estate of the purchaser, in exclusion of a third person, that person cannot resort to the equitable lien of the vendor on the estate ; or, in other words, can-

(*f*) *Wood v. Pollard*, 9 Price, 544.

(*g*) 1 Bro. C. C. 424.

not require the purchased estate and the personal estate to be marshalled.

Thus, in the case of *Coppin v. Coppin* (*h*), a younger brother purchased an estate of his elder brother, but part of the purchase money was not paid. The purchaser made his will, charging his estate with great legacies; but the will was attested by only two witnesses; afterwards the purchaser died, leaving his brother, the vendor, his heir and executor; and it was holden by Lord Chancellor King, that he had an equitable lien on the land; that he was entitled to retain the purchase-money out of the assets; and that the legatees could not stand in his place with respect to the equitable lien.

There is an important case on this subject, which demands particular attention. The case to which I allude is *Pollexfen v. Moore* (*i*). It appeared that Thomas Moore purchased an estate from Pollexfen, and had not paid all the purchase money; he devised the estate to Kemp, and, subject to some legacies, made Kemp his residuary legatee and executor. Kemp wasted the personal estate and died; whereupon the purchased estate descended to Boyle Kemp, his son and heir at law. Pollexfen filed his bill for payment of the remainder of the purchase money. Mrs. Moore, a legatee in Thomas Moore's will, brought a cross-bill, praying that if the purchase money should be paid out of the personal estate, she might stand in the purchaser's place as to his lien on the land. Lord Hardwicke admitted that Pollexfen had a lien on the estate for the remainder of the purchase-money. But he said, that this equity would not extend to a third person, but was confined to the vendor and vendee only; and if the vendor should exhaust the personal assets of Moore and

(*h*) *Coppin v. Coppin*, Sel. Cha. Ca. 28; 2 P. Wms. 291. (*i*) 2 Atk. 272.

Kemp, the defendant would not be entitled to stand in his place, and to come upon the purchased estate in the possession of Kemp's heir. But then the heir should not avail himself of the injustice of his father, who had wasted the assets of Moore, which should have been applied in paying the defendant's legacy. Therefore, Lord Hardwicke added, that the estate which had descended from Kemp, the executor of Moore, upon Boyle Kemp, came to him liable to the same equity as it would have been against the father, who had misapplied the personal estate; and in order to relieve Mrs. Moore, he would direct Pollexfen to take his satisfaction upon the purchased estate, because he had an equitable lien both upon the real and personal estate; and would leave this last fund open, that Mrs. Moore, who could at most be considered only as a simple contract creditor, might have a chance of being paid out of the personal assets.

The decree was general, that the residue of the purchase money and interest should in the *first place* be paid out of the personal estate of the said Thomas Moore; but that in case it should appear that Moore did not leave assets to pay what should be so due for the residue of the purchase money, *and all his other debts, legacies and funeral expenses*; or if the personal estate of Moore was not then sufficient, by reason that the assets of Kemp were not sufficient to answer such part thereof as came to his hands, then such deficiency, "*so far as the personal estate of the said Thomas Moore shall be applied in payment of the said purchase money (I)*," should be made good out of

(I) The decree has generally been considered at variance with the judgment. In the first edition of this work, the author stated, that he could not see the principle upon which the decree was made, if it were correctly stated, that if the purchaser did not leave assets to pay the purchase money, *and all his debts, funeral expenses and legacies*, the deficiency was to be made good out of the purchased estate. See

the purchased estate, and a competent part thereof was decreed to be sold accordingly.

Now in this case Lord Hardwicke, in giving judgment, clearly agreed with the decision in *Coppin v. Coppin*, that this equity did not extend to a third person. According to the judgment, his Lordship deviated from that rule in the case before him, on the ground of fraud. But Lord Hardwicke's decree cannot be satisfactorily accounted for on this narrow ground. The decree was, that if Thomas Moore (the original purchaser) did not *leave* assets to pay the residue of the purchase money, *and all his debts, funeral expenses and legacies*, then the purchased estate and the personal estate should be marshalled, so as to let in the simple contract creditors and legatees. This could not be on account of the fraud in Kemp, the devisee and executor.

It appears by the Registrar's book, that Pollexfen had not delivered the title-deeds and conveyance of the estate to the purchaser, but had by agreement kept them in his own custody as a security for the purchase money unpaid; and he strongly insisted by his bill, that he never intended the deeds to have operation till all the money was paid (*k*). And this, it is apprehended, must have been the ground on which the decree was pronounced. The seller had an equitable mortgage on the estate, and the case therefore came within the general rule, as to marshalling (*l*).

(*k*) Reg. Lib. B. 1745, fol. 283.

(*l*) *Lutkins v. Leigh*, For. 53; *Aldrich v. Cooper*, 8 Ves. jun. 397. In my copy of Forrester, *Holdsworth v. Holdsworth*, Hil. 23 Geo.

III. on appeal from the Rolls, is referred to; and see *O'Neal v. Mead*, 1 P. Wms. 693, and the cases in the note.

3 Atk. 273, n. 3, last edition. Upon searching the Registrar's book, it appears that the decree was qualified as stated in the text; and this emendation, with the observations in the text, will, it is hoped, conduce to a right understanding of this case. See Reg. Lib. B. 1745, fol. 283.

Thus explained, the case of *Pollexfen v. Moore* does not in the least clash with *Coppin v. Coppin*, but appears to establish an important distinction on this subject, viz. that where the purchaser has an equitable mortgage on the estate, or in case of fraud, the purchased estate and the personal estate may be marshalled in favour of simple contract creditors and legatees.

The general question under discussion arose in a case before Lord Eldon, but it was not necessary to decide it. *Pollexfen v. Moore*, as reported, was the only case cited. The Lord Chancellor assimilated the lien to a charge, and said, that the cases of marshalling seem to have gone this length: that, where there is a charge upon an estate descended, a legatee shall stand in the place of the person having that charge, resorting to the personal estate. His Lordship, however, gave no opinion upon the point, although it is clear that the inclination of his opinion was in favour of the legatee under the general rule(*m*). In a still later case the very point came before Sir Wm. Grant, Master of the Rolls, and called for a decision(*n*). The only case cited was *Pollexfen v. Moore*, as reported in *Atkyns*. His Honor said, that it was a very obscure report; and it had perplexed him very much formerly. The decision was against that *dictum* of Lord Hardwicke. This could not be distinguished from the common case of marshalling; that a person having resort to two funds shall not by his choice disappoint another, having one only: and a decree was pronounced accordingly.

The reader will observe, that the case of *Coppin v. Coppin* was not cited in either of the foregoing cases; and should the observations which have been made on

(*m*) See *Austen v. Halsey*, 6 Ves. jun. 475; and see *Cox's n. (1)* to 2 P. Wms. 295.

(*n*) *Trimmer v. Bayne*, 9 Ves. jun. 209; and see *Headley v. Roadhead*, Coop. 50.

Pollexfen v. Moore be thought correct, it would seem that Lord Hardwicke's decision was not in opposition to his *dictum* in the same case, expressive of the rule established by Lord Chancellor King. Perhaps the common case of marshalling may be thought not to apply to the point in question, when it is considered that the equitable lien was originally raised *by the construction of equity in favour of the vendor only*, and not in favour of third persons. It seems to have been thought in *Coppin v. Coppin*, and apparently with some reason, that extending the vendor's lien to third persons would be breaking in upon the statute of frauds. The general rule as to marshalling applies to cases where the person resorting to the personal estate has an actual charge or lien on the real estate: but in this case, if *equity* first deems the purchaser a trustee for the vendor as to so much of the estate as will satisfy the purchase money unpaid, and then permits a disappointed legatee to stand in the place of the vendor, it is creating a charge on the land in direct opposition to the statute of frauds. On sale of the estate, the purchase money becomes a debt payable out of the purchaser's personal estate; and the equitable lien ought, it is conceived, to be extended to only so much of the purchased estate as the personal estate is insufficient to answer. The vendor has not an original charge on the estate, but only an equity to resort to it, in case the personal estate prove deficient. In this view of the case an independent substantive charge on the land is, in fact, created by equity in favour of a legatee, although, if the legacy was actually imposed on the estate by a will not duly executed according to the statute of frauds, the Court is bound to say, that the will cannot be read as to the charge.

It is with great deference that these observations are submitted to the reader, after the high opinions which

have been given upon this point ; but as the case of *Coppin v. Coppin* was not cited in the recent cases, and the effect of a decision over-ruling that of Lord Chancellor King, does not appear to have presented itself to the mind of the Court, it still seems open to contend, that the equity under consideration cannot be extended to a third person, unless by reason of a fraud, or on the ground of the vendor having an equitable mortgage on the estate.

Since these observations were written, Lord Eldon, in deciding the general question of lien, observed that he had some doubt upon another point, whether the Court will in case of the death of the vendee marshal the assets, so as to throw the lien on the purchased estate. It has been often said, and the case of *Coppin v. Coppin* stated as an authority, that a Court will not do that. The Lord Chancellor in his judgment takes no notice of that point. In that case the heir happened to be the heir of the vendee, so that the estate was at home, and it was held that being also the executor, he was entitled to retain the purchase money out of the personal assets. That decision requires a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to, might be thought to have an immediate application, and the express terms of the decree in *Pollexfen v. Moore* might be found very inconsistent with it^(o). On a subsequent occasion, Lord Eldon observed, (in allusion to Lord Hardwicke's observation in *Pollexfen v. Moore*, before noticed), that if the meaning was that he (Lord H.) would follow the case of *Coppin v. Coppin*, and that if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in ap-

(o) 15 Ves. jun. 338, 339.

plying the principle, as it would then be in the power of the vendor to administer the assets as he pleases : having a lien upon the real estate to exhaust the personal assets, and disappoint all the creditors ; who, if he had resorted to his lien, would have been satisfied, and in that respect, with reference to the principle, the case is anomalous (*p*).

III. The observation of Lord Hardwicke before noticed, that this equity would not extend to a third person, but was confined to the vendor and vendee only, is frequently adduced to prove, that the lien does not exist when the estate passes into the hands of a third person ; but by the latter part of the same passage (*q*), it clearly appears, that this was not Lord Hardwicke's meaning ; and in *Walker v. Preswick* (*r*), Lord Hardwicke said, that this lien prevailed against the purchaser, his heir, or any claiming under him, with notice of this equitable title ; which evinces his meaning to be, that the purchased estate, and the personal estate of the purchaser, could not be marshalled in favour of a third person, although, as we have seen, he allowed it in *Pollexfen v. Moore*, by reason of the equitable mortgage.

It appears then, that this equitable lien prevails against the purchaser and his heir, and all persons claiming under him with notice, although for valuable consideration (*s*).

But it of course would not prevail against a *bonâ fide* purchaser without notice : and the mere deduction of the title to the estate from the first vendor by recital, will not

(*p*) 15 Ves. jun. 345.

(*q*) *Vide supra*, p. 560.

(*r*) 2 Ves. 622.

(*s*) *Heale v. Botelers*, Cary's Cha. Rep. 25 ; *Walker v. Preswick*,

2 Ves. 622 ; *Gibbons v. Baddall*,

2 Eq. Ca. Abr. 682, n. (b) to (D) ;

Elliot v. Edwards, 3 Bos. & Pull.

181 ; *Mackreth v. Symmons*, 15 Ves. jun. 329.

be sufficient to affect him, for that does not show it was not paid for (*t*).

Persons coming in under the purchaser by act of law, as assignees of a bankrupt (*u*), are bound by an equitable lien, although they had no notice of its existence; because, as Sir William Grant observed on another point, the assignment from the commissioners, like any other assignment by operation of law, passes the rights of a bankrupt precisely in the same plight and condition as he possessed them. Even where (as in this instance) a complete legal title vests in them, and there is notice of an equity affecting it, they take, subject to whatever equity the bankrupt was liable to (*x*).

But where a trustee for infants, to sell the lease of a brewhouse, plant and fixtures, contracted to sell them and let the purchaser into possession, and upon a bill filed by the trustee there was a decree for a specific performance, but the purchaser became bankrupt before the money was paid, the Vice-Chancellor held that there was no lien against the plant, which fell within the provision of the 21 Jac. I. c. 19 (*y*).

And creditors claiming under a conveyance from the purchaser, are bound in like manner as assignees (*z*), because they stand in the same situation as creditors under a commission.

In *Nairn v. Prowse* (*a*) the question arose, whether the lien of which we are now treating, should prevail against an equitable mortgage, by deposit of title-deeds; but the case went off on another ground, and the point was not

(*t*) See 1 Bro. C. C. 302.

(*y*) *Ex parte Dale*, 1 Buck, 365.

(*u*) *Blackburne v. Gregson*, 1 Bro. C. C. 420; *Bowles v. Rogers*, 6 Ves. jun. 95, n. (*a*); *Ex parte Hanson*, 12 Ves. jun. 346.

(*z*) *Fawell v. Heelis*, Ambl. 724; and see 1 Bro. C. C. 302.

(*a*) 6 Ves. jun. 752; see 2 Ves. & Bea. 149.

(*x*) See 9 Ves. jun. 100; 2 Ves. & Bea. 309.

decided. In *Stanhope v. Earl Verney* (b), Lord Northington held, that a declaration of trust of a term in favour of a person, was tantamount to an actual assignment; unless a subsequent incumbrancer, *bonâ fide*, and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it in favour of a second incumbrancer, was equivalent to an actual assignment of it; and therefore gave him an advantage over the first incumbrancer, which equity would not take from him.

Now it must at one view be seen how strong the analogy is between the point in question and this case. The only difference between them appears to be, that in the case before Lord Northington, both the trusts were declared by the parties; whereas in the case under consideration, the trust or lien is raised by equity, and not by express declaration, and the trust or equitable mortgage is generally created by the declaration of the parties; which circumstance, if it turn the scale either way, is certainly in favour of the mortgagee: so that, upon the authority of this case, we may perhaps venture to say, that an equitable mortgage, by deposit of deeds to a person, *bonâ fide*, and without notice, will give him a preferable equity; and will over-reach the vendor's equitable lien on the estate for any part of the purchase money (c).

A deposit of title-deeds by a simple contract debtor of the Crown, for securing part of the purchase money for another estate, binds the Crown as an equitable mortgage, although the purchaser also give his bond to the seller for the money (d).

(b) Butler's note (1) to Co. Litt. 290 b, Ch. July 27, 1761; see and consider *Frere v. Moore*, 8 Price, 475.

(c) In *Mackreth v. Symmons*,

15 Ves. jun. 329, there was no deposit of the deeds.

(d) *Casberd v. Ward*, 6 Price, 411; *Fector v. Philpott*, 12 Price 197.

Before closing this subject it may be observed, that if a purchaser deposit the deeds with a third person, as a collateral security for part of the purchase money, the seller, although he obtain possession of the conveyance to him from the depositary, and pledge it to persons who advance money upon it *bonâ fide*, cannot give them a lien beyond the amount of the purchase money actually unpaid (e).

(e) Hooper v. Ramsbottom, 4 Camp. Ca. 121; 6 Taunt. 12.

CHAPTER XIII.

OF THE CONSTRUCTION OF COVENANTS FOR TITLE.

SECTION I.

Where they run with the Land.

IN a preceding chapter we have seen to what covenants a purchaser is entitled (*a*); and we are now to consider the construction of covenants entered into by a vendor.

Covenants for title are termed real covenants, and pass to the assignees of the land by the common law, who may maintain actions upon them against the vendor and his real and personal representatives (*b*) (I). And as the covenants relate to the land, it seems that an assignee may maintain an action on the covenants, although the

(*a*) Ch. 9.

Campbell v. Lewis, 3 Barn. & Ald.

(*b*) Middlemore v. Goodale, 1 392; Lewis v. Campbell, 8 Taunt.
Ro. Abr. 521, (K.) pl. 6; Cro. Car. 715.
503. 505; Sir Wm. Jones, 406;

(I) A respectable writer has observed, that *cestuis que use* are grantees within the statute 32 Hen. VIII. c. 34; and are therefore entitled to the benefit of all covenants entered into by persons selling lands, for securing the title of such lands, 4 Cruise's Dig. p. 80, s. 44. The statute of Henry, however, appears only to relate to covenants which are a charge upon or incident to reversions; and a purchaser of a reversion is under this act clearly entitled to the benefit of covenants entered into by a lessee with the vendor, although the estate is vested in him by way of use under the statute of uses; because this last statute puts him in the place of his feoffee. Lee v. Arnold, 4 Leo. 27; S. C. Mo. 97, nom. Appowel v. Monnoux; Roll v. Osborne, Mo. 859. Where an estate is upon a purchase conveyed to *A* to uses, the covenants for title ought to be entered into with *A*. The statute of uses will of course turn the uses into possessions, and the *cestuis que trust* will then

covenants were entered into with the original grantee and his heirs only (c); and the right of action, even for a breach in the ancestor's life-time, will descend to the heir, and not to the executor, where no actual damage was sustained by the ancestor (d). So covenant will lie by the devisee of lands in fee, though broken in the testator's life-time. For the covenant passes with the land to the devisee, and is broken in the time of the devisee; for so long as the seller has not a good title there is a continuing breach. And it is not like a covenant to do an act of solitary performance, which not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require (e).

And as covenants entered into by a vendor with a purchaser run with the land in the possession of his representatives or assignees, so on the other hand covenants entered into by a purchaser with the vendor, respecting the land, will also run with the land, and charge the representatives or assignees of the purchaser in respect of it.

It is not, however, sufficient that a covenant is concerning the land; but in order to make it run with the land, there must be a privity of estate between the covenanting parties (f). Therefore, it seems that if the estate was,

(c) Co. Litt. 384 b; 385 a; Spencer's case, 5 Rep. 16; Bally v. Wells, 3 Wils. 25; Tatem v. Chaplin, 2 H. Blackst. 133.

(d) Kingdon v. Nottle, 1 Mau. & Selw. 355; King v. Jones, 5 Taunt. 418; 1 Marsh. 107; 4 Mau. & Selw. 188.

(e) Kingdon v. Nottle, 4 Mau. & Selw. 53.

(f) *Per* Lord Kenyon, Webb v. Russell, 3 Term Rep. 393; Stokes v. Russell, *ibid.* 678; affirmed in the Exchequer Chamber, 1 H. Blackst. 562.

be deemed assignees, and may take advantage of the covenants by force of the common law, just as if the statute of uses had not been passed, and the estate had been conveyed to them at once by A. This, therefore, appears to be wholly independent of the statute of 32 Hen. VIII.

at the time of the conveyance, mortgaged in fee, and the purchaser should enter into a covenant respecting the land with the vendor, the covenant would not bind the assignees of the land, but would be a mere covenant in gross; for the vendor would, in contemplation of law, be a mere stranger, and consequently there could be no privity of estate between him and the purchaser.

And even where there is a privity of estate at the time of the covenant, yet if a subsequent purchaser do not take the estate of the original purchaser, he will not be bound by the covenant. It seems difficult to conceive that this case can exist. It occurred, however, in the late case of *Roach v. Wadham* (g); an estate was conveyed to such uses as the purchaser should appoint; and in default of appointment, to himself in fee, yielding and paying to the vendors, their heirs and assigns, a perpetual fee-farm rent, which rent the purchaser, for himself, his heirs and assigns, covenanted to pay; the estate was afterwards conveyed to a purchaser; and as it was holden that the purchaser was in under the power, and not by virtue of the first purchaser's estate, it was admitted, on all hands, that an action brought against him by the original vendor, for the fee-farm rent, was not maintainable, for he had not the estate of the first purchaser, but took as if the original conveyance had been made to himself. This decision leads to the observation, that wherever a purchaser is to enter into a covenant, which it is intended shall run with the land, the vendor ought to insist upon the purchaser taking a conveyance in fee, and should not permit the estate to be limited to the usual uses to bar dower.

The proposition before stated, that it is not sufficient that a covenant is concerning the land, but, in order to

(g) 6 East, 289.

make it run with the land, there must be a privity of estate between the covenanting parties, seems to apply as well to covenants entered into by a vendor, as to covenants entered into by a purchaser. But the consequences of this doctrine are truly alarming. In a great proportion of cases, the vendor has either mortgaged the estate in fee, or is a mere *cestui que trust*; and if his covenants were to be deemed covenants in gross, the assignees of the land could only compel performance of the covenants by the circuitous mode of using the name of the first purchaser or his representatives, whom at the distance of some years it might be very difficult to trace.

It seems impossible to get over the objection, by the *form* of the covenant; for although the vendor covenant with the purchaser, his heirs and *assigns*, yet the assignee of the lands will not be entitled to the benefit of the covenant, unless it run with the land under the general rule of law (*h*). The only mode by which the difficulty can be avoided is, to require the vendor to take a conveyance to himself in fee, or to the usual uses to bar dower, previously to executing a conveyance to the purchaser; and this, I believe, has been sometimes done since it was first suggested in this work. If indeed, the objection should be thought to exist, it might also be thought, that where the vendor conveys the estate to the purchaser under the usual power of appointment, the covenants will not run with the land: but this, it is conceived, would be carrying the rule much too far; and there seems to be some ground to contend, that even in *Roach v. Wadham*, as the power was coupled with an interest, the second purchaser might have been held to have come in under, and to stand in the place of the first purchaser, so as to satisfy

(*h*) See *Tempest's case*, Clayt. 60; and see *Palm. 558*, and *Roach v. Wadham, ubi sup.*

the rule of law, although he did not actually, as it was determined, take the estate of the first purchaser (*i*). The point, however, was considered as clear, and was not discussed either at the bar or upon the bench.

SECTION II.

Of their general Construction.

It hath already been observed (*k*), that the covenants usually entered into by a vendor, seised of the inheritance, are, 1st, that he is seised in fee : 2dly, that he has power to convey : 3dly, for quiet enjoyment by the purchaser, his heirs and assigns : 4thly, that the land shall be holden free from incumbrances : and lastly, for further assurance.

The five covenants are several and distinct, but the first and second of them are synonymous ; for if a man be seised in fee, he has power to sell (*l*). But the converse of this proposition is not universally true (*m*).

A man having merely a power to appoint an estate, cannot be said to be seised in fee of the estate, although he has a right to convey : and accordingly, in cases of this nature, it is usual to omit the first covenant, and to insert a covenant that the power was well created, and is not suspended or extinguished.

Covenants for title are either general and unlimited, extending to the acts of all the world, or limited and restricted to the acts of certain persons named in the deed;

(*i*) See and consider Co. Litt. 215 b. s. 10; Glover v. Cope, 1 Show. 284; Hurd v. Fletcher, Dougl. 43; Duke of Marlborough v. Lord Godolphin, 2 Ves. 61; and see 3 Wils. 26, at the bottom.

(*k*) *Supra*, ch. 9.

(*l*) Nervin v. Munns, 3 Lev. 47; Browning v. Wright, 2 Bos. & Pull. 13.

(*m*) See 4 Cruise's Dig. 78, s. 30.

and under this branch of our subject we may consider, 1st, to what and against whose acts general and limited covenants extend : 2dly, in what cases restrictive words shall or shall not extend to all the covenants in the deed : and 3dly, to what remedy a purchaser is entitled under covenants for the title, in case he is evicted, or the title prove bad.

I. First then, 1. Although covenants are general and unlimited, and are not restricted to the acts of persons claiming lawfully, yet it is now, perhaps, settled (*n*), although the contrary was formerly holden (*o*), that such a covenant shall not extend to a tortious eviction, but to evictions by title only ; because the law itself defends every one against a wrongful entry ; and, therefore, if a purchaser be disturbed in his possession by a person having no title, he has a remedy at law against the wrong doer ; and if he be legally evicted, he may recover against the vendor, in an action on the covenant. Lord C. J. Vaughan (*p*) adduces the four following reasons why the covenants should not extend to tortious evictions : 1. It is unreasonable, as the vendor cannot prevent the entry ; 2. the vendee has his remedy against the wrong-doer, and therefore ought not to charge an innocent person ; 3. the vendee would have a double remedy for the same injury ; 4. it might open a door to fraud, for the purchaser might secretly procure a stranger to make a tortious entry, that he might charge the covenantor with an action. And

(*n*) *Dudley v. Foliot*, 3 Term Rep. 584. See Dy. 238 a, marg. ; and *Crosse v. Young*, 2 Show. 425, and the cases cited in the note to 3 Term. Rep. 587 ; in some of which, however, the point was not decided, but a distinction was

taken between *express* and *implied* covenants.

(*o*) *Mountford v. Catesby*, Dy. 328 a. See 1 Ro. Abr. 430, pl. 12 ; *Shep. Touch.* 166, 170 ; *Anon.* 1 Freem. 450, pl. 612 ; *Anon.* 2 Ventr. 46 ; *Anon.* Loft, 460.

there is a case in the year-books in the reign of Hen. VIII. where the question was, whether a general covenant in a lease should extend to an eviction by one who had no right. Englefield said, that he should not have a writ of covenant against his lessor when he is ousted by tort, for there is no mischief, because he may have a writ of trespass, or an *ejectione firmæ* against the person who ousted him ; but if he was ousted by one who had a title paramount against whom he could have no relief, then he may have a writ of covenant against his lessor, *Quod fuit concessum per plusieurs* (q).

2. But where a vendor covenants to indemnify a purchaser against a particular person by name, there the covenant shall extend to an entry by that person, be it by *droit* or *tort*, for it is to be presumed that such person had an interest (r).

3. And where the covenantor himself does any act asserting a title, it will be a breach of the covenant, although he covenanted against *lawful* disturbances only, and the act done by him was tortious, and might be the subject of an action of trespass (s). The contrary, however, was formerly holden (t). It must, nevertheless, be an act asserting a title ; therefore, if the seller went on the estate to sport, the purchaser could not maintain covenant (u).

4. So a covenant against all claiming or *pretending to claim* any right extends to a tortious eviction (v).

5. And whatever opinion may anciently have been en-

(q) T. 26 H. 8, pl. 11.

(r) Foster v. Mapes, Cro. Eliz. 212; Hob. 35; 1 Ro. Abr. 430, pl. 13. See Hayes v. Bickerstaff, Vaugh. 118; Nash v. Palmer, 5 Mau. & Selw. 374. Fowle v. Welsh, 1 Barn. & Cres. 29.

(s) Lloyd v. Tomkies, 1 Term Rep. 671; Crosse v. Young, 2

Show. 425; S. C. MS.

(t) Davie v. Sacheverell, 1 Ro. Abr. 429, pl. 7.

(u) See Seddon v. Senate, 13 East, 72.

(v) Chaplain v. Southgate, 10 Mod. 384; Com. 230; Perry v. Edwards, 1 Str. 400.

retained (*x*), yet it is now clear, that a suit in equity, by which the purchaser is disturbed, is within a covenant for quiet enjoyment against disturbances generally (*y*). It is, however, customary to expressly extend covenants for title to *equitable* charges, disturbances, &c.

6. In a case where the seller covenanted generally that he was seised in fee, without any condition, &c. or any other estate, matter, cause, restraint, or thing whatsoever, whereby to alter, bar, change, charge, burthen, impeach, incumber or determine the same, and had good right to convey the same. It appeared that the lady of the manor had actually demised a small part of the land sold for ninety-nine years, determinable on lives, and the lessees had entered and continued to enjoy the estates. It was held that the lease was made by mistake, and did not amount to a disseisin, and that the covenant did not extend to the leases. It was said, what can a man be supposed to covenant against beyond the validity of the title? and most assuredly not against these surreptitious pocket leases. The action of covenant, it was added, only extended to the consequence of legal acts, and the reason is to be found in the case of *Hayes v. Bickerstaff*, that the law shall never judge that a man covenants against the wrongful acts of strangers (*z*).

It will be observed, that the leases were accompanied with actual possession by the lessees, who had expended money on the property. They were therefore within the covenant, and unless the covenants were held to extend to them, general covenants for title would be waste paper.—They are always intended to guard against a title adverse to the covenantor's, although it may not be a lawful title.

(*x*) *Selby v. Chute*, Mo. 859; 1 Brownl. 23; *Winch*, 116; 1 Ro. Abr. 430, p. 15; and see 3 Leo. 71, pl. 109. (*y*) *Calthorp v. Hayton*, 2 Mod. 54; *Hunt v. Danvers*, T. Raym. 370.
(*z*) *Jerritt v. Weare*, 3 Price, 575.

Clearly the leases were a charge on the property *at the time of the conveyance*, and an ejectment at all events was necessary to dispossess the lessees. They therefore were an incumbrance within the covenant. It is not like the case of interruptions by persons not claiming lawfully subsequently to the conveyance.

7. A covenant for right to convey extends not only to the title of the covenantor, but also to his capacity to grant the estate. Therefore, where, upon a conveyance by a man and his wife, the husband covenanted that they had good right to convey the lands, and the wife was under age, the covenant was adjudged to be broken (*a*).

In respect to the persons against whose acts limited covenants will extend, it seems that,

1. A covenant for quiet enjoyment against *A.* and any other person by his means, title or procurement, is broken by the entry of a person in whose name *A.* purchased jointly with his own name (*b*).

2. In this case Mr. Justice Doddridge put many cases. If a tenant in tail to whom the estate-tail was made, makes an estate and covenants as before, and the issue ousts the covenantee, the covenant is broken, because, being his purchase, the descent to his issue is by his means, although not by his title. But if the issue make an estate and covenant, and the issue of the issue enter, it is not broken, because they are not in by his means, but by descent. But if there be a lessee for life, remainder over, and the lessee make an estate and covenant, and die, and he in remainder enter, it is not broken, because he is in by the feoffor, not by the lessee. But if a man enfeoff upon condition to be enfeoffed for life, remainder

(*a*) *Nash v. Ashton*, Sir Tho. 339; *Cro. Jac.* 657. *Spencer Jones*, 195. *v. Marriott*, 1 *Barn. & Cres.*

(*b*) *Butler v. Swinnerton*, *Palm.* 457.

over, there it shall be otherwise, because by his procurement and means ; *et sic de similibus*.

3. So if *A* covenant for quiet enjoyment against all claiming by, from or under him, a claim of dower by his wife is within the covenant ; but otherwise, if the mother of *A* claim her dower, because she does not claim by, from or under him (*c*).

4. A covenant for quiet enjoyment against *A*, or any person claiming under him, extends to a person deriving title under an appointment made by *A*, by virtue of a power, in the creation of which he concurred, although the estate did not move from *A*, and the estate of the appointee is, according to the general rule, considered as limited to him by the deed creating the power.

This was settled in the case of *Hurd v. Fletcher* (*d*). Sir John Astley and his wife levied a fine of *her* estate to the use of Sir John for life, with power of leasing ; remainders over, with a joint power of revocation to Sir John and Lady Astley. They exercised this power, and, subject to the husband's life-estate, and power of leasing and other uses, which afterwards determined, limited the estate to Lord Tankerville in tail. Sir John afterwards granted a lease not warranted by the power, and covenanted for quiet enjoyment by the lessee, without any interruption by him, or any person or persons claiming, or to claim by, from or under him. Lord Tankerville's remainder in tail having fallen into possession, he evicted the lessee on account of the defective execution of the power, whereupon the lessee brought an action against Sir John's executors ; and it was holden, that Sir John was a necessary party to the second declaration of uses ; and, therefore, Lord Tankerville claimed under him, and the eviction was within the covenant.

(*c*) Godb. 333 ; Palm. 340.

(*d*) Dougl. 43 ; see *Evans v. Vaughan*, 4 Barn. & Cress. 261..

5. It may be proper to mention, that the case of *Butler v. Swinnerton*, which (to borrow an expression of Lord Kenyon's) is the *magna charta* of the liberal construction of covenants for title, is also stated in *Shep. Touch.* 171, which goes on to state, "and so it is also, if *A* purchase land of *B*, to have and to hold to *A* for life, the remainder to *C* the son of *A* in tail, and after *A* doth make a lease of this land to *D* for years, and doth covenant for the quiet enjoying, as in the last case, and then he dieth; and then *C* doth oust the lessee; in this case this was held to be *no* breach of the covenant:" and for this position, Swan's case, M. 7 and 8 Eliz. is cited, and no reference is made to any other report of the case. Now this case, as it stands in *Shep. Touch.* (a book of acknowledged authority) is in direct opposition to the decision in *Butler v. Swinnerton*; but from other reports of Swan's case (*e*), it appears that there was no *actual* covenant in the lease, but merely a covenant in law on the words "*concessit et dimisit*," and therefore the Judges thought the action did not lie, because the covenant determined with the estate of the lessee.

6. A covenant for quiet enjoyment, quietly and clearly acquitted of and from all grants, &c. rents, rent-charges, &c. whatsoever, has been holden to extend to an annual quit-rent payable to the lord of the manor, *and incident to the tenure* of the lands sold, although there was no arrear of the rent due (*f*).

7. A covenant for quiet enjoyment against any interruption of, from or by the vendor or his heirs, or any person whomsoever, legally or equitably claiming, or to claim any estate, &c. in the premises, by, from, under or in trust for him or them, or by, through or with his or

(*e*) Mo. 74, pl. 204; Dy. 257, And. 12, pl. 25.
 pl. 13; Bendl. 138, pl. 203; and (*f*) *Hammond v. Hill*, Com. 180.

their acts, means, *default*, privity, consent or procurement, was adjudged to extend to an arrear of quit-rent due at the time of the conveyance, although it was not shown that the rent accrued due during the time the vendor held the estate. For the Court said, if it were in arrear in his life-time, it was a consequence of law, that it was by *his default*; that is, *by his default* in respect of the party with whom he covenants to leave the estate unincumbered (*g*).

In this case it was argued by the counsel for the vendor, and apparently on very solid grounds, that to make the vendor liable to the arrear of this rent, under his covenant, would be tantamount to a decision that the covenant, although limited, should extend to the acts of all the world. The clear intention of the parties was, that the vendor should covenant against his own acts only; and yet it should seem that the argument of the Court would apply as well to a mortgage, or any other incumbrance created by a prior owner, as to an arrear of quit-rent, in payment of which a former occupier made default.—The reader should be cautious how he applies this decision to cases arising in practice, as it may lead him to draw conclusions not authorized by prior decisions.

8. We should be careful to distinguish the foregoing case from that (*h*) where the lessor, *reciting that he was seised of an estate of freehold and inheritance in the estate*, covenanted for quiet enjoyment against himself, his heirs, &c. or any other person or persons lawfully claiming by, from or under him, &c. or by or through his, their or any of their acts, means, *default* or procurement. The lessees

(*g*) *Howes v. Brushfield*, 3 East, 491. See and consider Lord Alvanley's judgment in *Hesse v. Stevenson*, 3 Bos. & Pull. 565.

(*h*) *Lady Cavan v. Pulteney*, 2 Ves. jun. 544. See Reg. Lib. B. 1799, fo. 816.

were evicted by the remainder-man under a settlement, and it appeared that the lessor could have obtained the fee-simple by suffering a recovery. Lord Rosslyn considered it to be clear, that on eviction by any person claiming paramount to the lessor, they must, upon that eviction, have under the covenant in the leases satisfaction from his assets. The ground of this opinion must have been, that the eviction was owing to the *default* of the lessor, in not suffering a recovery. He assumed to be tenant in fee, and the nature of his title rested in his own breast; whether the default arose from fraud or negligence was to the lessees immaterial.

II. We are now to consider in what cases restrictive words added to some of the covenants only, shall extend to all the covenants in the deed.

It may be first necessary to premise, that where covenants are limited to particular acts, as to the acts of the vendor for instance, the covenants are restrained in the following manner: “that for and notwithstanding any act, deed, matter or thing whatsoever, by him the said *A*, the vendor, made, done, committed or executed, or knowingly or willingly suffered to the contrary thereof,” he is seised in fee. And that, “for and notwithstanding any such act, deed, matter or thing whatsoever, as aforesaid,” he has power to convey. And that the purchaser, his heirs and assigns, shall quietly enjoy “without the interruption, &c. of *A* or his heirs, or any person claiming by, from or under, or in trust for him or them.” “And *that*” (I) free from incumbrances made or suffered

(I) This pronoun is used emphatically. You shall enjoy the estate, and *that* free from incumbrances. Dr. Johnson has extracted a passage from the Duty of Man, in which the word is used in the same sense: “We must direct our prayers to right ends; and *that* either in

“ by *A.*, or any person claiming by, from or under, or in trust for him.” And lastly, that “ *A.*, and all persons claiming any estate in the premises by, from or under, or in trust for him,” shall execute further assurances. But although this is the usual and technical manner of restraining covenants, yet an *agreement*, in any part of a deed, that the covenants shall be restrained to the acts of particular persons, will be good, although the covenants themselves are general and unlimited (*i*).

2. General covenants will not, however, be cut down, unless the intention of the parties clearly appears.

Therefore, in the case of *Cooke v. Fowndes* (*k*), where the vendor covenanted that he was seised of a good estate in fee, *according to the indenture made to him by B.*, (of whom he purchased), it was determined to be a general covenant; for the reference to the conveyance by *B* served only to denote the limitation and quality of the estate, and not the defeasibleness or indefeasibleness of the title.

In a modern case, where, in an assignment of a lease by executors, they had covenanted for quiet enjoyment without any let, &c. of them, or either of them, their or either of their executors, administrators or assigns, *or any other person or persons whomsoever*, it was insisted at the bar that executors can only be understood to covenant against their own acts; and therefore, that the word “ any other person or persons whomsoever,” must be restrained to persons claiming under them. And it is, perhaps, not too much to say, that the opinion of the Court inclined to this construction (*l*). Wherever, therefore, executors or

(*i*) *Brown v. Brown*, 1 Lev. 57.

(*l*) *Noble v. King*, 1 H. Black.

(*k*) 1 Lev. 40; 1 Keb. 95.

34.

respect of the prayer itself, or the things we pray for.” It has, however, been thought that the word has crept into the common form of covenants through inadvertence.

trustees agree to enter into covenants extending beyond their own acts, the agreement of the parties should be distinctly stated in the recitals.

3. In a case (*m*) where *A* and *B* were joint-tenants for years of a mill, *A* assigned all his interest to *C*, without the assent of *B*, and died. *B* afterwards by indenture reciting the lease, and that it came to him by survivorship, granted the residue of the term to *J. S.* and covenanted for quiet enjoyment of it notwithstanding any act done by him. *B* also gave the purchaser a bond conditional to perform the covenants, *grants*, articles and agreements in the assignment; and the purchaser having been evicted by *C* of the moiety assigned to him, brought an action on the bond, and obtained judgment. Lord Eldon (*n*) seemed to consider the judgment as having turned on the recital, and that the recital itself amounted to a warranty. But the ground of the decision appears to be, that the word *grant* in the assignment amounted to a warranty of the title, and was not qualified by the ensuing particular covenant, because the grant was of the whole estate, as appeared from the recital, and was defective from the first as to a moiety, and the condition of the bond was to perform all grants, &c.

It seems material to refer the case of *Johnson v. Proctor* to the true ground of the decision, because if the case turned solely on the recital, it might perhaps be thought that a general recital in a conveyance of the inheritance of an estate, that the vendor is seised in fee, would amount to a general warranty, and would not be controlled by limited covenants for the title—a proposition which certainly cannot be supported.

4. Where restrictive words are inserted in the first of

(*m*) *Proctor v. Johnson*, Yelv. 175; Cro. Eliz. 809; Cro. Jac. 233.

(*n*) See 2 Bos. & Pull. 25; and see *Seddon v. Senate*, 13 East, 63; *Barton v. Fitzgerald*, 15 East, 530.

several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct.

Thus, in *Nervin v. Munns* (o), the vendor covenanted, 1st, that notwithstanding any act by him to the contrary, he was seised in fee : 2dly, that he had good right to convey : 3dly, that the lands were clear of all incumbrances made by him, his father, or grandfather : and 4thly, that the vendee should quietly enjoy the estate against all persons claiming under the vendor, his father, or grandfather. And it was holden by three Justices against North, Chief Justice, that the second covenant, although general, was restrained by the first covenant to acts done by the vendor.

So in *Browning v. Wright* (p), where a vendor who claimed an estate in fee by purchase, sold the estate, and covenanted first, that notwithstanding any thing by him done to the contrary, he was seised in fee, “ and that he had good right, &c. to convey in manner aforesaid,” it was holden that the generality of the latter covenant was restrained by the restrictive words in the former. For, in the first place, the purchaser was, according to the general practice, entitled to limited covenants only ; and, in the next place, the special covenants would be of no use, if the other were general. Besides, the defendant having covenanted that, “ for and notwithstanding any thing by him done to the contrary,” he was seised in fee, *and that* he had good right to convey ; the latter part of the covenant, coupled as it was with the former part by the words “ and that,” must necessarily be over-ridden by the introductory words “ for and notwithstanding any thing by him done to the contrary (q).”

Again, where tenant *pur auter vie* leased for twenty-

(o) 3 Lev. 46.

(p) 2 Bos. & Pull. 13.

(q) *Per* Lord Alvanley, 3 Bos. & Pull. 574.

one years, and covenanted that he had not done any *act*, *but* the lessee should or might enjoy it during the years; afterwards, within the twenty-one years, *cestui que vie* died; and it was adjudged that the covenant was not broken, for “but” referred the subsequent words to the preceding words (*r*).

So in *Broughton v. Conway* (*s*), a covenant that the vendor had not done any act to disturb the vendee, *but that* the assignee might enjoy without the disturbance of him *or any other person*, was held to be confined to acts done by the vendor, on the ground of the latter words being only a continuation of and dependent on the preceding matter. In this case, however, one of the Judges was decidedly of a contrary opinion; and certainly there were express words to get over, namely, “or any other person;” which circumstance does not occur in any other of this line of cases, in all of which the reader will perceive, that no word was rendered inoperative, but the introductory clause was merely held to extend over all the distinct covenants, in the same manner as a general introduction to a will frequently influences the whole will. And in a recent case (*t*), where the covenants were introduced with the usual words, restricting them to the covenantor’s own acts, but the covenants for quiet enjoyment ended thus: “of or by the said grantors or any of them, &c. *or of or by any other person or persons whatsoever* :” and the covenant against incumbrances was general, excepting only a chief-rent; the Court of King’s Bench determined, that the covenant for quiet enjoyment was not restrained by the introductory words of restriction, but was general and unlimited. Lord Ellenborough,

(*r*) *Peles v. Jervies*, Dy. 240, marg.; Cro. Jac. 615, pl. 5.

Ellenborough, C. J. 8 East, 89; and 1 Brod. & Bing. 340.

(*s*) Dy. 240; Mo. 58; and see S. C. cited and applied by Lord

(*t*) *Howell v. Richards*, 11 East, 633.

C. J. in delivering the opinion of the Court, justly laid great stress on the covenant being a distinct covenant from the covenant for title. He said, that it was perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner, for the particular description of title which he purports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is, in strictness of law, in some degree imperfect, but he may at the same time know, that it has not become so by any act of his own; and he may likewise know, that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it; he may, therefore, very readily take upon him an indemnity against an event which he considers as next to impossible, while he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found at any period to have been liable to some exception at the time of his conveyance.

In a later case (*u*), where the subject was elaborately discussed, the covenants in an assignment of a leasehold estate were, 1. that notwithstanding any act by the seller, the lease was a good lease; 2. "and further, that" the purchaser might peaceably enjoy without any interruption from "the seller, his executors, administrators or assigns, or any other person or persons whatsoever having or lawfully claiming, or who should or might at any time or times thereafter, during the said term, have or lawfully claim any estate," &c. in the premises; *and that* free from incumbrances by the seller; and moreover, for further assurance by the seller, his executors and administrators, and all persons claiming by, from, under or in trust for him

(*u*) *Nind v. Marshall*, 1 Brod. & Bing. 319; and see *Foord v. Wilson*, 8 Taunt. 543.

or them. All the covenants therefore were restricted to the acts of the seller, except the covenant for quiet enjoyment, which in words expressly extended to all mankind. It was held by three Judges against one, that by construction the covenant for quiet enjoyment was restrained to persons claiming under the seller, and this case was distinguished from *Howell v. Richards*, on the ground that there the covenant, respecting incumbrances, contained words as general as the words of the preceding covenant for quiet enjoyment, with one single exception, viz. the chief-rent, which was not an act or default of the party, or of any claiming under him : this exception, therefore, confirmed the generality of all the other words.

Perhaps we should in this place notice the case of *Barton v. Fitzgerald (v)*. It arose upon covenants in an assignment of a lease. The lease was recited to be for the term of ten years, and the seller assigned the estate to the purchaser for the residue of that term. The covenants were, first, the common covenant, that the seller had done no act to incumber, except an under-lease ; 2dly, “and also,” that the lease was subsisting, and not become void or voidable ; 3dly, for quiet enjoyment against the act of the seller ; and lastly, for further assurance of the seller during the residue of the term. It appeared that the lease was for ten years, if a person should so long live, and he died after the assignment, but before the expiration of the ten years, by effluxion of time. And the Court of King’s Bench held, that the second covenant was general and unlimited, and that by the death of the *cestui que vie*, the purchaser had a good right of action. The Judges relied principally on the recital. The exception of the under-lease, which was for a term absolute, imported, they thought, that the seller had a right to

incumber absolutely for the term stated, and they were of opinion, that all the other covenants would be operative, though the second were construed to be absolute. This case, it will be observed, depended upon very particular circumstances; independently of which it should seem, that the covenant upon which the purchaser recovered would have been restrained by the other covenants.

5. But where the *first* covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent.

Thus in *Gainsford v. Griffith* (*x*), on an assignment of a leasehold estate, the vendor covenanted that the lease was a good, certain, perfect and indefeasible lease in the law, and so should remain during the residue of the term, and that the purchaser, his executors, administrators and assigns, should quietly enjoy the premises without any let, denial, &c. by the vendor, his executors or assigns; and acquitted or otherwise saved harmless of all incumbrances committed by the vendor. And it was holden, that the generality of the preceding covenant was not restrained by the latter covenant.

And in *Norman v. Foster*, Lord C. J. Hale said,—If I covenant that I have a lawful right to grant, and that you shall enjoy, notwithstanding any claiming under me; these are two several covenants, and the first is general, and not qualified by the second. And to this Wylde, J. agreed, and he said, that one covenant went to the *title*, and the other to the *possession* (*y*).

So in the late case of *Hesse v. Stevenson* (*z*), where, on an assignment of certain shares of a patent right, the assignor covenanted, that he had good right, &c. to con-

(*x*) 1 Saund. 58; 1 Sid. 328. See 2 Bos. & Pull, 23, 25; 1 Brod. & Bing. 331.

(*y*) 1 Mod. 101.

(*z*) 3 Bos. & Pull. 565.

vey the shares, and that he had not by any means directly or indirectly forfeited any right or authority he ever had or might have had over the same, it was decided that the generality of the first covenant was not restrained by the latter covenant. Lord Alvanley said, that the covenant, instead of being framed in the usual and almost daily words, where parties intend to be bound by their own acts only, viz. "for and notwithstanding any act by him done to the contrary," omitted them altogether. The omission of these words was almost of itself decisive. The attention of the purchaser was not called by any words to the intent of the vendor to confine his covenant to his own acts. The Court ought not to indulge parties in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly understood.

6. And in cases of this nature, as, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other hand a preceding general covenant will not enlarge a subsequent limited covenant.

Thus, in *Trenchard v. Hoskins*(a), a person being seised of an estate granted under letters patent, conveyed it to a purchaser, and in the conveyance the grant from the Crown was recited, and the title was deduced from the grantee to the vendor, who entered into covenants, first, that he was seised in fee; secondly, that he had good power to convey; and thirdly, that there was no reversion in the Crown, *notwithstanding any act done by him*. In grants of lands by the Crown, it is usual to reserve a reversion which the grantee cannot bar. After great difference of opinion on the subject, it seems to have been decided, that the restrictive words to the last

(a) *Winch*, 91; 1 Sid. 328. See 2 Bos. & Pull, 19.

covenant did not extend to the two preceding ones ; the Court presuming the intention to be, that the vendor should enter into an absolute covenant for his seisin in fee, in all cases but one ; namely, that he should not be liable on the objection of a reversion existing in the Crown, unless that reversion appeared to have been vested in the Crown by his own act (*b*).

7. Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others, although they all relate to the same land (*c*).

Thus, where *A.* covenanted that he was seised in fee notwithstanding any act done by him, and that the lands were of a certain annual value ; the latter was holden to be an absolute covenant, that the lands were of the stated value (*d*).

So in another case (*e*), where a man covenanted that he was seised in fee, notwithstanding any act done by him or any of his ancestors ; and that no reversion was in the king or any other ; and that the estate was of a certain annual value ; and that the plaintiff and his heirs should enjoy the estate discharged from all incumbrances made by him or any of his ancestors, it was decided, that the covenant as to value was an absolute and distinct covenant, and had no dependance upon the first part of the covenant.

8. In the case of *Rich v. Rich* (*f*), a covenant “ that lands were of the value of 1,000 *l. per annum*, and so should continue, notwithstanding any act done or to be done by the covenantor,” was holden to be only a covenant that the covenantor had not lessened the value.

(*b*) See 2 Bos. & Pull. 25, *per* 495 ; 1 Jones, 403. S. C.
Lord Eldon.

(*c*) See 3 Lev. 47.

(*d*) *Hughes v. Bennett*, Cro. Car.

(*e*) *Crayford v. Crayford*, Cro. Car. 106.

(*f*) Cro. Eliz. 43.

9. This subject must not be closed without observing, that if general covenants are entered into contrary to the intention of the parties, equity will, on sufficient proof, correct the mistake in the same manner as errors are corrected in marriage articles, and will relieve against any proceedings at law upon the covenants, as they originally stood (*g*).

III. 1. It still remains to say a few words concerning a purchaser's remedy under covenants for the title; and first, if he be evicted, and the eviction is within the covenant, he may bring an action at law for damages.

2. But, as we have already seen, unless the eviction be within the covenant, or there was a fraudulent concealment of the defect, a purchaser cannot recover the purchase-money, in case of eviction, either at law or in equity (*h*).

3. If the title prove bad, a purchaser may have recourse to law for damages, or *if the defect can be supplied by the vendor*, he may file a bill in equity for a specific performance of the covenant for further assurance. And a vendor who has sold a bad title, will, under a covenant for further assurance, be compellable to convey any title which he may have acquired since the conveyance, although he actually purchased such title for a valuable consideration (*i*).

4. It seems that, under a covenant for further assurance a purchaser may require a duplicate of the conveyance to be executed to him, in case he is compelled to part with the original to a purchaser from him of part of the

(*g*) Coldcott v. Hill, 1 Cha. Ca. 15; 1 Sid. 328, cited; Fielder v. Studly, Rep. temp. Finch, 90. See 2 Bos. & Pull. 26; 3 Bos. & Pull. 575; and *supra*, p. 149.

(*h*) *Supra*, p. 488.

(*i*) Taylor v. Debar, 1 Cha. Ca. 274; 2 Cha. Ca. 212. See Seabourne v. Powell, 2 Vern. 11; and see ch. 16, s. 10, *infra*.

estate (*k*) ; but it may be doubted whether he can require a covenant to produce the title-deeds if the purchase was completed without such a covenant (*l*).

5. So if the vendor become bankrupt, the purchaser may call upon his assignees to execute further assurances, although the vendor was only tenant in tail, and did not suffer a recovery (*m*).

6. But if the original contract was not fit to be executed by equity, the Court will not interfere in behalf of the purchaser, but leave him to his remedy at law (*n*). And if the title prove bad, and the purchase was made at a great undervalue, equity will relieve the vendor against an action on the covenants for title, allowing the purchaser his purchase-money, with interest only, he discounting the mesne profits (*o*).

7. An action for breach of a covenant for title (*p*) will not be barred by the bankruptcy and certificate of the covenantor, although the cause of action accrued before the bankruptcy.

Lastly, it has been lately determined by the Court of King's Bench, that an action of covenant does not lie against a devisee upon the statute of fraudulent devises (*q*). No such remedy lies at common law, and therefore, although a vendor die seised of real estates, yet if they are devised by his will, a purchaser will not have any remedy against them, notwithstanding that the covenants for title are broken, and there is no other fund to which he can resort for damages. This construction of the Act

(*k*) *Napper v. Lord Allington*,
1 Eq. Ca. Abr. 166, pl. 4.

(*l*) *Fain v. Ayers*, 2 Sim. & Stu.
533. See *Hallett v. Middleton*,
1 Russ. 243.

(*m*) *Pye v. Daubuz*, 3 Bro. C.C.
595.

(*n*) *Johnson v. Nott*, 1 Vern. 271.

(*o*) *Zouch v. Swaine*, 1 Vern.
320.

(*p*) *Hammond v. Toulmin*, 7
Term. Rep. 612; *Mills v. Auriol*,
1 Hen. Blackst. 433.

(*q*) 3 W. & M. c. 124; *Wilson*
v. Knubley, 7 East, 128.

must, in many instances, prove highly injurious to purchasers, for certainly this point has never been adverted to in practice (I). A purchaser may, however, guard against the effect of a devise of the vendor's real estates, by taking a bond conditioned to be void if the vendor is seised in fee, and has good right to convey, &c. The penalty would be a *debt* recoverable under the statute. Such a bond is however scarcely ever taken at the present day.

(I) The author in the sessions of 1818 prepared a bill to remedy this defect in the statute of fraudulent devises, which passed the House of Commons, but was not read a second time in the House of Lords. In each of the two last sessions the bill in an amended form again passed the House of Commons.

CHAPTER XIV.

OF THE PERSONS INCAPABLE OF PURCHASING.

UNDER this head we may consider, 1st, Who are incapable of purchasing absolutely for their own benefit by the general rules of law : and, 2dly, Who are incapable of purchasing particular property, except under particular restraints, on account of the rules of equity.

SECTION I.

Of Persons incapable of Purchasing by the general Rules of Law.

THIS incapacity is of three kinds: 1st, An absolute incapacity: 2dly, An incapacity to hold, although an ability to purchase: and, 3dly, An incapacity to purchase, except *sub modo*.

I. First then, With respect to persons who are altogether incapable of purchasing.

The parishioners, or inhabitants of any place, or the churchwardens, are incapable of purchasing lands (*a*) by those names.

But it seems that in London the parson and churchwardens are a corporation to purchase lands (*b*). And churchwardens and overseers are enabled, by statute

(*a*) Co. Litt. 3 a.

(*b*) Warner's case, Cro. Jac. 532 ; Hargrave's n. (4) to Co. Litt. 3 a.

law (c), to purchase a workhouse for the poor, but this is merely as trustees, and does not affect the general rule of law.

II. With respect to persons who are capable of purchasing, but incapable of holding : They are,

1st, Aliens : for although they may purchase, yet it can only be for the benefit of the king ; and upon an office found, the king shall have it by his prerogative (d). And it seems that an alien cannot protect himself by taking the conveyance in the name of a trustee, for the mischief is the same as if he had purchased the lands himself (e).

But if an alien be made a denizen by the king's letters patent, he is then capable of holding lands (f) purchased after his denization.

And it seems, that if an alien purchase lands, and before office found the king make him a denizen by letters patent, and confirm his estate, the confirmation will be good ; as the land is not in the king till office found (g).

2dly, Persons who have committed felony or treason, or have been guilty of the offence of *præmunire*, and afterwards purchase lands, and then are attainted ; for they have ability to purchase, although not to hold ; and for that reason the lord of the fee shall have the lands ; but if they purchase after they are attainted, they are then in the same situation with aliens, and the lands must go to the king (h).

Lastly, Corporations sole or aggregate, either ecclesiastical or temporal, cannot hold lands without due license

(c) 9 Geo. I. c. 7, s. 4.

(d) Co. Litt. 2 b.

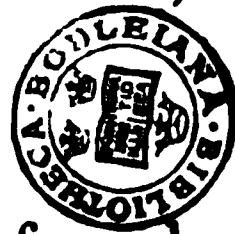
(e) The King v. Holland. All.
14 ; Sty. 20, 40, 75, 84, 90, 94 ;
1 Ro. Abr. 194, pl. 8.

(f) Co. Litt. 2 b.

(g) Goulds. 29, pl. 4.

(h) Co. Litt. 2 b. See Rex v.
Inhab. of Haddenham, 15 East,
463.

for that purpose (*k*): and the lord of the fee, or in default thereof within the time limited by the statutes, the king may enter (*l*).



III. With respect to persons capable of purchasing *sub modo*: They are,

1st, Infants under the age of twenty-one years, who may purchase, and at their full age may bind themselves by agreeing to the purchase; or may wave the purchase without alleging any cause for so doing: and if they do not agree to the purchase after their full age, their heirs may wave the purchase in the same manner as the infants themselves could have done (*m*).

2dly, *Femes covert*, who are capable of purchasing, but their husbands may disagree thereunto, and divest the whole estate, and maintain trover for the purchase money (*n*). If a husband neither agree nor disagree, the purchase by his wife will be effectual; but after his death she may wave the purchase, without giving any reason for so doing, although her husband may have agreed to it. And if, after her husband's death, she do not agree to it, her heirs may wave it (*o*).

A *feme covert* may, however, purchase lands pursuant to an authority given by her husband, and he cannot avoid it afterwards (*p*).

3dly, Lunatics or idiots, who are capable of purchasing; but although they recover their senses, cannot themselves, it should seem, wave the purchase (*q*): and

(*k*) Co. Litt. 99 a.

(*l*) Co. Litt. 2 b.

(*m*) Ketsey's case, Cro. Jac. 320; 1 Ro. Abr. 731, (K.); Co. Litt. 2 b. See Holmes v. Blogg, 8 Taunt. 508.

(*n*) Garbrand v. Allen, 1 Lord

Raym. 224. See Francis v. Wigzell, 1 Madd. 253.

(*o*) Co. Litt. 3 a; Barnfather v. Jordan, Dougl. 452, 2d edit.

(*p*) Garbrand v. Allen, *ubi sup*.

(*q*) On this point see 2 Blackst.

Comm. 291, 7th edit.

if they recover and agree thereunto, their heirs cannot set it aside.

If they die during their lunacy or idiocy, then their heirs may avoid the purchase (*r*). And as the king has the custody of idiots, upon an office found he may annul the purchase (*s*): and after the lunatic is found so by inquisition, his committee may vacate the purchase (*t*).

Lastly, under this head we might formerly have ranked papists and persons professing the popish religion (*u*), who had neglected to take the oath prescribed by the 31 Geo. III. c. 32 (*x*). For a papist took for the benefit of his protestant next of kin till his conformity; for the benefit of himself after his conformity; and for the benefit of his heir after his death—Nay, for the benefit of himself, during his life and non-conformity, by reason of the action which was given him; and might therefore be said to be capable of purchasing *sub modo* (*y*).

But by the 10 Geo. 4. c. 7. s. 23, it was enacted, that after the passing of that Act no oath or oaths should be tendered to or required to be taken by his Majesty's subjects professing the roman-catholic religion, for enabling them to hold or enjoy any real or personal property other than such as might by law be tendered to and required to be taken by his Majesty's other subjects.

(*r*) Co. Litt. 2 b.

(*s*) Co. Litt. 247 a.

(*t*) Clerk by Committee v. Clerk, 2 Vern. 412; Addison by Committee v. Dawson, 2 Vern. 678; Ridler v. Ridler, 1 Eq. Ca. Abr.

279.

(*u*) See 11 & 12 W. III. c. 4;

Michaux v. Grove, 2 Atk. 210.

(*x*) See 43 Geo. III. c. 30.

(*y*) See Mallom v. Bringlee, Willes, 75; Com. 570, S. C.

SECTION II.

Of Purchases by Trustees, Agents, &c.

WE come now to persons who are incapable of purchasing particular property, except under particular restraints, on account of the rules of equity.

I. It may be laid down as a general proposition, that trustees (*z*), (unless they are nominally such, as trustees to preserve contingent remainders (*a*),) agents (*b*), commissioners of bankrupts (*c*), assignees of bankrupts (*d*) (I),

(*z*) *Fox v. Mackreth*, 2 Bro. C. C. 400; 4 Bro. P. C. by Tomlins, 258; *Hall v. Noyes*, 3 Bro. C. C. 483; and see 3 Ves. jun. 748; *Kellick v. Flexny*, 4 Bro. C. C. 161; *Whichcote v. Lawrence*, 3 Ves. jun. 740; *Campbell v. Walker*, 5 Ves. jun. 678; and *Whitackre v. Whitackre*, Sel. Cha. Ca. 13.

(*a*) See *Parks v. White*, 11 Ves. jun. 226.

(*b*) *York-Buildings Company v. Mackenzie*, 8 Bro. P. C. 42; *Low-*

ther v. Lowther, 13 Ves. jun. 95. See *Watt v. Grove*, 2 Scho. & Lef. 492; *Whitcomb v. Minchin*, 5 Madd. 91; *Woodhouse v. Meredith*, 1 Jac. & Walk. 204.

(*c*) *Ex parte Bennet*, 10 Ves. jun. 381; *ex parte Dumbell*, Aug. 13, 1806; Mont. notes, 33, cited; *ex parte Harrison*, 1 Buck, 17.

(*d*) *Ex parte Reynolds*, 5 Ves. jun. 707; *ex parte Lacey*, 6 Ves. jun. 625; *ex parte Bage*, 4 Madd. 459.

(I) Lord Eldon has said, that the rule is to be more peculiarly applied with unrelenting jealousy in the case of an assignee of a bankrupt; adding, that it must be understood, that, whenever assignees purchase, they must expect an inquiry into the circumstances. See 6 Ves. jun. 630, n. (b); and 8 Ves. jun. 346; 10 Ves. jun. 395. And an assignee purchasing the estate himself, or permitting his co-assignee to purchase it, will be a sufficient cause of removal. *Ex parte Reynolds*, 5 Ves. jun. 707.

If an assignee purchase an estate sold under the commission, and upon an accidental increase in the value of the property, he afterwards sells it at a considerable advance, he cannot, upon discovering that he ought not to have been a purchaser, pay the difference of the sales to the general fund of the creditors. *Ex parte Morgan*, Feb. 24, 1806;

solicitors to the commission (*e*), auctioneers, creditors who have been consulted as to the mode of sale (*f*), or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves; except under the restrictions which will shortly be mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Empor emit quam minimo potest, venditor vendit quam maximo potest* (I).

The able counsel for the appellants in *York-Buildings Company v. Mackenzie* (*g*), strongly observed, that the ground on which the disability or disqualification rests, is

(*e*) *Owen v. Foulkes*, 6 Ves. jun. 630, n. (*b.*); *ex parte* Linwood; *ex parte* Churchill, 8 Ves. jun. 343, cited; *ex parte* Bennet, 10 Ves. jun. 381; *ex parte* Dumbell, Aug. 13, 1806; Mont. notes, 33, cited. See 12 Ves. jun. 372; 3 Mer. 200.

(*f*) See *ex parte* Hughes, 6 Ves. jun. 617; *Coles v. Trecothick*, 9 Ves. jun. 234; 1 Smith's Rep. 233; *Oliver v. Court*, 8 Price, 127.

(*g*) 8 Bro. P. C. 63, where the authorities in the civil law are collected.

Mont. notes, 31. And where upon the sale of a bankrupt's estate by auction, in two lots, both of the lots were bought in by the assignee without the consent of the creditors, the Lord Chancellor, although there was a profit on the resale of one lot, which was more than equal to the loss on the resale of the other, so that the balance was in favour of the estate, held the assignee liable to make good the loss on the lot which was resold at a less sum, without permitting him to set off the profit gained by the resale of the other lot. *Ex parte* Lewis, 1 Glyn. & Jame. 69. *Ex parte* Buxton, *ib.* 355.

(I) This principle has been attended to in the general inclosure act, which renders commissioners incapable of purchasing any estate in the parish in which the lands are intended to be inclosed, either in the names of themselves or others, until five years after the date and execution of the award, 41 Geo. III. c. 109, s. 2.

no other than that principle which dictates, that a person cannot be both judge and party. No man can serve two masters. He that is intrusted with the interest of others cannot be allowed to make the business an object of interest to himself; because, from the frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is intrusted.

A creditor having taken out execution may buy the estate sold under the execution (*h*). Indeed this was never doubted where the transaction was a fair one. And the rule has never been applied to a purchase by mortgagee from the mortgagor, and it is to be hoped that it never will. In Ireland, many leases granted by mortgagors to mortgagees were set aside by Lord Redesdale, on the ground that the transaction was usurious, although that learned Judge's successors have not been inclined to carry the principle as far as he did. In one case (*i*) it was objected that the decision might tend to impeach dealings between mortgagor and mortgagee for a sale of the equity of redemption. But Lord Redesdale said, that to this a good answer was given at the bar. The cases are totally different; the parties stand in a different relation: if there be two persons ready to purchase, the mortgagee and another, the mortgagor stands equally between them; and if the mortgagee should refuse to convey to another purchaser, the mortgagor can compel him, by applying the purchase money to pay off the mortgage. It can therefore only be for want of a better purchaser, that the mortgagor can be compelled to sell to the mortgagee: *but Courts view transactions, even of that sort between mortgagor and mortgagee, with considerable jealousy, and will*

(*h*) *Stratford v. Twynam*, 1 Jac. Lef. 673; and see 1 Ball & Beatty, 418. 164; *ex parte Marsh*, 1 Madd. 148.

(*i*) *Webb v. Rorke*, 2 Scho. &

set aside sales of the equity of redemption, where, by the influence of his incumbrance, the mortgagee has purchased for less than others would have given, and there were circumstances of misconduct in his obtaining the purchase.

Perhaps the observation, that "Courts view transactions, even of that sort between mortgagor and mortgagee, with considerable jealousy," puts the doctrine higher than one should wish to see it stand. A sale by a mortgagor to a mortgagee stands on the same principle as a sale between parties having no connection with each other, and can only be impeached on the ground of fraud: the mere circumstance that the mortgagee purchased for less than another would have given, would not of itself be a sufficient ground to impeach a sale; and Lord Redesdale, in stating that as an ingredient, adds also circumstances of misconduct in obtaining the purchase. Where a mortgagee sells under the general order in bankruptcy, it is usual to apply for leave for him to bid at the sale, where he intends to do so. But there he may fairly be considered as the seller, and he cannot, without the leave of the Court, sustain the two characters of seller and buyer (*k*). But if a mortgagee take a conveyance with a power of sale, he is a trustee for sale, and as such disabled from purchasing (*l*).

The principle has, however, been extended to a purchase by an attorney from his client, while the relation subsists (*m*).

So a person chosen as an arbitrator, cannot buy up the unascertained claims of any of the parties to the re-

(*k*) *Ex parte* Du Cane, 1 Buck, 18. See *ex parte* Marsh, 1 Madd. 148.

(*l*) *Downes v. Glazebrook*, 3 Mer. 200.

(*m*) See *Bellew v. Russell*, 1

Ball & Beatty, 96; 9 Ves. jun. 296; 13 Ves. jun. 138, as to *gifts*, which cite the early cases. And see *Lord Selsey v. Rhoades*, 2 Sim. & Stu. 41; *Williams v. Llewellyn*, 2 You. & Jer. 68.

ference : it would corrupt the fountain, and contaminate the award (*n*).

Where a person cannot purchase the estate himself, he cannot buy it as agent for another (*o*), and perhaps cannot even employ a third person to contract or bid for the estate on the behalf of a stranger (*p*).

This general rule stands much more upon general principle, than upon the particular circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases (*q*).

The necessity of such a general rule is evinced by an instance mentioned by Lord Eldon, of a solicitor under a commission, who finding he could make a bargain to sell the estate for 1,400*l.* kept that in his own breast, and made a bargain with the assignees for the purchase of it at 350*l.* (*r*)

In *Davidson v. Gardner*(*s*), Lord Hardwicke laid down the following rules as to a trustee purchasing of his *cestui que trust*. 1st, That in all cases of a trustee purchasing of the *cestui que trust* the Court will look upon it with a jealous eye. 2dly, It has been laid down as a general rule, that where a trustee for persons not *sui juris*, as infants and *femes covert*, becomes both buyer and seller, the Court will under no circumstances whatever, be they never so fair between the parties (as consulting the friends of the

(*n*) *Blennerhasset v. Day*, 2 Ball & Beatty, 116; *Cané v. Lord Allen*, 2 Dow, 289.

(*o*) See 9 Ves. jun. 248; *ex parte Bennet*, 10 Ves. jun. 381.

(*p*) See *ex parte Bennet*, *ubi sup. sed qu.*

(*q*) See 8 Ves. jun. 345, *per* Lord Eldon.

(*r*) See 8 Ves. jun. 349.

(*s*) Chancery, 21st July 1743, MS. See *Prestage v. Langford*, *infra*; *Lambert v. Bainton*, 1 Cha. Ca. 199.

infant, or of their refusing to purchase, or the like), establish a purchase of that kind, unless the transaction is legitimated by the act of the Court, or some public act. And the reason is, because if such purchases were allowed, they would be liable to very great abuses; and this is the reason why the Court will not allow a trustee any thing for his trouble. So, where a trustee renewed a lease in his own name, though it was proved that all the friends of the infant were consulted, and they refused to renew it, the Court decreed it to be in trust for the infant, though not the least unfairness appeared; which was the case of Rumford Market, before Lord King(*t*). But if a bill is brought, and a sale ordered, and notice of the sale before the Master, and the trustee purchases, the Court has refused to set such sale aside, all the other circumstances being fair. So where there was a public sale of an estate by proclamation in the country; which was the case of Saunders *v.* Burroughs, before the present Master of the Rolls; but if that had been a private sale, though the consent of all the relations was had, and no unfairness appeared, I think such a sale should be set aside, at least not carried into execution. But it might be inconvenient to extend the rule so far as to prevent a trustee from purchasing of one who was *sui juris*, where no unfairness appeared. And in the principal case, which was of a mixed kind, the defendant who had purchased being a trustee for the plaintiff, who was a *feme covert*, and had the estate to her separate use, and therefore in a court of equity considered as a *feme sole*, and *sui juris*, as to the disposal of her estate; Lord Hardwicke dismissed the bill, which was brought to set aside the assignment she had made of her interest in a brewhouse to the de-

(*t*) Keech *v.* Sandford, Sel. Cha. Ca. 61. See Lesley's case, 2 Freem. 52.

fendant; it appearing that she had received a full value, and no particular instances of fraud being proved.

From this case it appears that, in the time of Lord Hardwicke, a purchase by a trustee, even for infants, was deemed good, if the estate was sold by public auction, or before a Master; but a purchase by a trustee, whether for adults or infants, cannot now be supported, although the estate be sold by public auction (*u*), or before a Master, under a decree for sale (*x*). Nor, indeed, ought the publicness of the sale to sustain a purchase, which cannot otherwise be supported. For the trustee may know not only the surface value, but that there are minerals, in which case he would buy upon the rent, and gain all that advantage (*y*). So there may be a great many clandestine dealings, which may bring it to a price far short of that which would be produced if full information was given (*z*).

But under particular circumstances, a purchase by a trustee or agent, before the Master, may be confirmed, although with great reluctance.

Thus, in *Wren v. Kirton* (*a*), the facts were these: Upon a former sale before the Master, the sum of 23,000*l.* was bid by a person bidding *bonâ fide*. That sale was defeated by setting up a fictitious bidder. Afterwards the lot was again put up three times. On the two first occasions no more was offered than 12,000*l.* and 6,000*l.* At the last sale one Wilson was declared the purchaser at the sum of

(*u*) *York-Buildings Company v. Mackenzie*, 8 Bro. P. C. 42; *Whichcote v. Lawrence*, 3 Ves. jun. 740; *Campbell v. Walker*, 5 Ves. jun. 678; *Sanderson v. Walker*, 13 Ves. jun. 601, S. C.; and *ex parte James*, 8 Ves. jun. 337; and see 10 Ves. jun. 393; *Attorney Gen. v. Lord Dudley*, Coop. 146.

(*x*) *Price v. Byrn*, 5 Ves. jun. 681, cited. See *Cary v. Cary*, 2 Scho. & Lef. 173.

(*y*) See 10 Ves. jun. 394.

(*z*) See 8 Ves. jun. 349.

(*a*) 8 Ves. jun. 502.

15,000*l.* He purchased as trustee for Wade, the agent and manager of the colliery.

The Lord Chancellor said, if this had been an original sale, and the agent had purchased in the name of another person, very slight circumstances would have induced him, even at some risk, to set that aside; as it was the duty of Wade, if he meant to bid, to furnish all the knowledge he had to those who were to sell. The difficulty that pressed him was, the consequence, the danger of further loss by resale. He would (he added) not hesitate to open the sale if the least advance upon 15,000*l.* was offered; but without such an offer there was nothing leading him to suppose it would ever again reach the sum that was originally bid.—The Master's report of the best bidder was, with considerable reluctance, confirmed; unless, on or before the first seal, an application should be made to open the biddings, giving security to answer the difference between the produce of the resale and the sum of 15,000*l.* No security was however offered, and the agent completed the purchase.

In *Oldin v. Samborne* (b), Lord Hardwicke said, that it was improper for a guardian to purchase his ward's estate immediately on his coming of age; but though it has a suspicious look, yet if he paid the full consideration, it is not voluntary, nor can it be set aside. But it seems clear, that such a purchase would now be set aside on general principles, without reference to the adequacy of the consideration (c).

It appears, however, that unless fraud can be proved, the circumstance of the purchaser being related to the trustee, agent or other person having a confidential character, cannot even be opposed as a bar to the *aid* of the Court *in favour of the purchaser*.

(b) 2 Atk. 15.

(c) See *Dawson v. Massey*, 1 Ball & Beatty, 219.

Thus, in *Prestage v. Langford* (*d*), the auctioneer's son, who was in partnership with his father, and another person, bought an estate sold by order of a trustee for infant legatees, and contracted to sell it a few days afterwards for 750 *l.* more than they gave for it. But the proof of fraud being judged defective, the Court would not set aside the sale merely because one of the auctioneers was buyer and seller too, but decreed a specific performance, nevertheless, without costs; *in order* (as was said) *to discourage all such suspicious transactions.*

So, in the late case of *Coles v. Trecothick* (*e*), the trustee's father (for whom the trustee in this instance acted as agent), purchased an estate (which had been previously put up to sale by auction, and bought in) of the *cestui que trust* for 20,000 *l.*; and as the *cestui que trust* had full knowledge of the value, &c. and he himself, and not the trustee, fixed the price, and consented to the sale, and no fraud was proved, a performance *in specie* was decreed; although the *cestui que trust* had since the contract been offered 5,000 *l.* more for the estate.

It must, however, be observed, that the case of *Prestage v. Langford* was decided before the broad rule which now prevails was laid down. Indeed that case is clearly overruled by later decisions, as the purchaser was in fact employed in the sale. And the decision in the case of *Coles v. Trecothick* does not seem to meet with the approbation of the Profession. But if, under the particular circumstances of this case, the Court had not compelled execution of the contract, it would certainly have been deciding, that neither a trustee himself, nor any one connected with him, or related to him, can buy of the *cestui que trust*, however fair and open the circumstances may

(*d*) 3 Wood, 248, n. Chan. M.
11 Geo. III.

(*e*) 9 Ves. jun. 234; 1 Smith,
233.

be. Indeed, Lord Eldon seems to have founded his decision on the ground, that the trustee himself might have purchased the estate.

It may here be remarked, that where a power is given by a settlement to trustees to sell the estate with the consent of the tenant for life, or to the tenant for life to sell with the consent of the trustees, it is in practice considered, that the estate may be safely purchased by the tenant for life himself. Lord Eldon, although fully aware of the danger attending a purchase of the inheritance by a tenant for life, seems to think that it cannot be impeached on general principles (*f*). A few years ago, considerable doubt was entertained by the Profession, whether the power of sale and exchange, usually inserted in settlements of estates, authorized a sale or exchange to or with the tenant for life, or at least whether equity would not relieve against the transaction, and that doubt was stated as a ground for requiring the aid of parliament, in a petition for an act to enable an exchange of settled estates with the tenant for life; which it was conceived could not be done under a power of sale and exchange in the settlement. The Chief Baron, and Mr. Baron Hotham, to whom the bill was referred, reported, and submitted it as their opinion, that the doubt which was the cause of petitioning for the bill was not well founded; and therefore the bill was unnecessary, *and that the passing of such a bill might cause a great prejudice to numerous titles under executions of powers of sale and exchange of a similar kind*: and the House of Lords accordingly rejected the bill; in consequence of which many estates of great value have been purchased, and taken in exchange by tenants for life, under the usual powers of sale and exchange. Since these observations were written, the point has again

(*f*) See 9 Ves. jun. 52; and 11 Ves. jun. 480; but see *ib.* 476, 477.

been agitated in practice. It is a point which no private opinion can put at rest, although, after the opinions of the Chief Baron, and Mr. Baron Hotham, sanctioned by the House of Lords, and followed up in practice, there seems to be no ground to fear that a different rule will be established. The point has been decided by the Lord Chancellor since the above observations were written, in favour of the execution of the power (*g*), and the point, therefore, is now at rest.

II. The purposes for which estates are vested in trustees for sale, are generally, either for the benefit of creditors; of individuals *sui juris*; or persons not *sui juris*; and we are now to consider in what manner trustees may become purchasers of estates vested in them for those several purposes, without being liable to be called to account for so doing.

Of purchases by trustees or other prohibited persons in general, it must previously be remarked, that the Court will not permit them to give up their office, and to bid, as it would lead to infinite mischief. The *cestuis que trust* themselves, as we shall see, can decide this; and no Court can say *ab ante* they will permit it: for circumstances may exist at the time of the second sale that the Court cannot know (*h*).

1. With respect to a trustee for creditors purchasing the estate himself.

In *Whelpdale v. Cookson* (*i*), where a trustee for creditors purchased part of the estate himself, Lord Hardwicke said, if the *majority* of the creditors agreed to allow it, he should not be afraid of making the precedent.

But in a late case (*k*), Lord Eldon said, he doubted the

(*g*) *Howard v. Ducane*, 1 Turn.

(*i*) 1 Ves. 9; 5 Ves. jun. 682, n.

1.

(*k*) See 6 Ves. jun. 628. See

(*h*) *Ex parte James*, 8 Ves. jun.

ex parte Bage, 4 Madd. 459.

52.

authority of that case; for if the trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others; and if the jealousy of the Court arose from the difficulty of the *cestui que trust* duly informing himself what is most or least for his advantage, he had considerable doubt whether the majority could in that article bind the minority.

It seems doubtful, therefore, whether the purchase can be supported unless *all* the creditors consent, although convenience, and the general rule of transactions by a body of persons, are strongly in favour of Lord Hardwicke's opinion.

2. With respect to a trustee for a person *sui juris* becoming the purchaser of the estate.

If a trustee even for a person *sui juris* purchase in the name of another person, the sale will be set aside, as that very circumstance carries fraud on the face of it (*l*).

But it must not be understood that a trustee cannot buy from his *cestui que trust*; the rule is, that he cannot buy from himself (*m*). If, therefore, the *cestui que trust* clearly discharges the trustee from the trust, and considers him as an indifferent person, there is no rule which says that he may not purchase of him, although the Court will look with a very jealous eye on a transaction of that nature (*n*): and to be supported, it must clearly appear, that the purchaser, at the time of the purchase, had shaken off his confidential character, by the consent of the *cestui que trust* freely given, after full information, and bargained for the right to purchase (*o*).

So an attorney is not *incapable* of contracting with his

(*l*) Lord Hardwicke *v.* Vernon, 4 Ves. jun. 411; 14 Ves. jun. 504; and see 2 Bro. C. C. 410, n.

(*m*) 10 Ves. jun. 246; and see Ayliffe *v.* Murray, 2 Atk. 58;

Crowe *v.* Ballard, 3 Bro. C. C. 117; 1 Ves. jun. 215.

(*n*) See 6 Ves. jun. 627.

(*o*) See 8 Ves. jun. 353.

client, but the relation must be in some way dissolved, or, if not, the parties must be put so much at arm's length, that they agree to take the character of purchaser and vendor; and you must examine whether all the duties of those characters have been performed. If an attorney deal with his client, he should require him to get another attorney to advise with him as to the value, or, if he will not, then out of that state of circumstances, this clear duty results from the rule of equity, and throws upon him the whole *onus* of the case; that if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he had given his client all that reasonable advice against himself that he would have given him against a third person (*p*). So if an attorney be employed as agent in the management of a landed estate, he cannot deal with his principal for that estate without honestly communicating to the principal all the knowledge respecting its value which he had acquired as his agent, and unless he do this, the contract, if questioned, cannot be supported (*q*).

And the same circumstances that will authorize a trustee to contract for himself will enable him to purchase as the agent of another (*r*).

3. With respect to a trustee for a person not *sui juris* buying the estate himself.

The only mode by which this can be effected, so as to protect the purchaser, is, if he sees that it is absolutely necessary the estate should be sold, and he is ready to give more than any one else, that a bill should be filed, and he should apply to the Court by motion to let him be the purchaser. This is the only way he can protect him-

(*p*) *Gibson v. Jeyes*, 6 Ves. jun. 266; see p. 277, 278, *per* Lord Eldon, C.; *Wood v. Downes*, 18 Ves. jun. 120; *Montesquieu v.*

Sandys, *ibid.* 302.

(*q*) *Cane v. Lord Allen*, 2 Dow, 289, *per* Lord Eldon, C.

(*r*) See 9 Ves. jun. 248.

of timber or other parts of the inheritance, and interest thereon, from the times of their being received. This was decided in the great case of *York-Buildings Company v. Mackenzie*, in the House of Lords (*y*); and it appears that the House allowed him the value of improvements of all kinds, even in the instance of a mansion-house erected, and plantations of shrubs, &c. (*z*).

And where the *cestui que trust* is not desirous to take back the estate, he may require it to be put up to sale again at the price at which it was bought by the trustee: and that if any one bid more, the trustee shall not have the estate: but if not, that he may be compelled to keep it (*a*).

If, however, the *cestui que trust* be desirous to have the estate put up in lots, and it was bought by the trustee in one lot, he must either repay the trustee the purchase-money with such interest as he would have been liable to pay upon his bargain, he accounting for the rents received, or paying an occupation-rent for the estate, if he personally occupied it: or the *cestui que trust* must consent to have the estate put up in one lot on the terms before mentioned (*b*).

The trustee will, in case of a resale, be allowed any money *bond fide* laid out, not only in substantial repairs and improvements, but also in such as have a tendency to bring the estate to a better sale; which will be added to the amount of the purchase-money, and the estate will be put up at the aggregate sum; deducting, how-

(*y*) 8 Bro. P. C. 42.

(*z*) See 6 Ves. jun. 624. This must have been decided in some of the subsequent appeals; see 8 Bro. P. C. 71, note.

(*a*) *Ex parte Reynolds*, 5 Ves.

jun. 707; *ex parte Hughes, ex parte Lacey*, and *Lister v. Lister*, 6 Ves. jun. 617, 625, 631.

(*b*) *Ex parte James*, 8 Ves. jun. 337.

ever, an allowance for acts that deteriorate the value of the estate (c).

If any old buildings have been pulled down by the purchaser, and new ones erected, the old buildings, if incapable of repair, will be valued as old materials, but otherwise as buildings standing (d).

But no allowance will be made him for any loss he may sustain by a fall in the funds (e).

Formerly where a purchase by a trustee was set aside, the rule was, to put up the estate again to be sold to the best bidder; the trustee accounting for the profits, and being allowed his principal money and interest at 4 per cent (f).

If the trustee has actually sold the estate, the *cestui que trust* may compel the trustee to pay him what he may have received above the original purchase-money (g).

Where a trustee buys the trust-estate at a fair price, the sale is seldom called in question, unless he afterwards sell it to advantage; and then the *cestui que trust* is of course only desirous that the money gained by the trustee on the resale should be paid to him.

Owing to this circumstance, a purchaser of a trust-estate from a trustee who had previously sold to himself, is seldom implicated in the suit; but it seems clear that a person purchasing with notice of the previous transaction would be liable to the same equity as the trustee was subject to. In the late case of *Randall v. Errington* (h), a purchaser from a trustee who had purchased in the

(c) *Ex parte* Hughes, 6 Ves. jun. 617; *ex parte* Bennet, 10 Ves. jun. 381.

(d) 6 Madd. 2.

(e) *Ex parte* James, *ubi sup.*

(f) See *Whelpdale v. Cookson*,

1 Ves. 9; 5 Ves. jun. 682, n.

(g) *Fox v. Mackreth*, 2 Bro. C. C. 400; *ex parte* Reynolds, 5 Ves. jun. 707.

(h) 10 Ves. jun. 423.

name of a trustee was made a defendant, and the prayer of the bill was, that if he purchased without notice, the trustee might account for the money gained by the resale ; but as the equity against the purchaser was not noticed either by the counsel or the court, it must be presumed that no notice was proved. A different rule would, to use the expression of a great man, blow up like gunpowder this branch of equitable jurisdiction. It is indeed true, that in the case in the House of Lords, the proceedings in the Court of Sessions were reversed without prejudice to the titles and interests of the lessees and others who might have contracted with the defendant *bond fide*, and before the dependence of the process (I). But this may be satisfactorily accounted for on two grounds : the one, that no notice was charged on the lessees, nor were the leases attempted to be impeached ; the other, that the relief sought had been delayed for many years, and the point established by the House of Lords was, to say the least, a new doctrine with reference to Scotland. But this equity is now well established. No person, therefore, can be advised to become the purchaser of an estate so circumstanced, unless the *cestui que trust* will join ; nor would a court of equity, on any other terms, enforce a specific performance of such a contract. But this doctrine cannot be extended to the mere case of a purchase by a trustee in his own name, from his *cestui que trust*, which may or may not be binding according to circumstances, unless the purchaser have also notice that the sale was not such as could be supported in equity.

Before closing this chapter it must be remarked, that if a *cestui que trust* acquiesce for a long time in an improper

(I) And see the same rule as to under-leases of a charity-estate, where the original lease is set aside as improvident. *Attorney General v. Griffith*, 13 Ves. jun. 565 ; *Attorney General v. Backhouse*, 17 Ves. jun. 283.

purchase by his trustee, equity will not assist him to set aside the sale (*i*). In *Price v. Byrn* (*k*), Lord Alvanley refused the aid of the Court, because the bill had been delayed twenty years.

But laches does not apply to a body of creditors, who may, therefore, claim the aid of equity at a much more distant period after the sale than an individual can (*l*).

And although acquiescence may have the same effect as original agreement, and may bar such a remedy as this, yet the question as to acquiescence cannot arise until it is previously ascertained that the *cestui que trust* knew his trustee had become the purchaser: for, while the *cestui que trust* continued ignorant of that fact, there is no laches in not quarelling with the sale upon that special ground (*m*).

A purchase by a trustee from his *cestui que trust* is merely *malum prohibitum*, and not *malum in se*. It is one of those contracts which admit of confirmation by the injured party. But to give effect to a confirmation in a case like this, the party confirming must not be under the control of the person whose title is to be confirmed, and he must have a full knowledge of all the circumstances, and of his power to set aside the former transaction (*n*).

(*i*) See *ex parte James*, 8 Ves. jun. 337; *Hall v. Noyes*, 3 Ves. jun. 748, cited; and see 11 Ves. jun. 226; *Morse v. Royal*, 12 Ves. jun. 355; *Medlicott v. O'Donel*, 1 Ball & Beatty, 156.

(*k*) 5 Ves. jun. 681, cited; and see *Norris v. Neve*, 3 Atk. 26; *Gregory v. Gregory*, Coop. 201.

(*l*) *Whichcote v. Lawrence*, 3 Ves. jun. 740; and a case before the Court of Exchequer, 6 Ves. jun. 632, cited; *York-Buildings*

Company v. Mackenzie, 8 Bro. P. C. by Tomlins, 42.

(*m*) *Per Sir William Grant*, 10 Ves. jun. 427; and see 2 Ball & Beatty, 129.

(*n*) *Morse v. Royal*, 12 Ves. jun. 355; *Murray v. Palmer*, 2 Scho. & Lef. 474; *Roche v. O'Brien*, 1 Ball & Beatty, 330; *Wood v. Downes*, 18 Ves. jun. 120; *Dunbar v. Tredennick*, 2 Ball & Beatty, 304. *Vide supra*, p. 249.

CHAPTER XV.

OF JOINT PURCHASES: PURCHASES IN THE NAMES OF
THIRD PERSONS; AND PURCHASES WITH TRUST-
MONEY: AND OF THE PERFORMANCE OF A COVE-
NANT TO PURCHASE AND SETTLE AN ESTATE.

SECTION I.

Of Joint Purchases.

WHERE two or more persons purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, this is a joint tenancy, that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other (a) (I), but where the proportions of the

(a) See *Moyse v. Gyles*, 2 Vern. 385; *York v. Eaton*, 2 Freem. 23; *Thicknesse v. Vernon*, 2 Freem. 84; *Anon. Carth.* 15; and see 3 Atk. 735; 2 Ves. 258; *Rea v. Williams*, MS. Appendix, No. 21; *Aveling v. Knipe*, 19 Ves. jun. 441.

(I) This distinction has not been thought satisfactory. A writer, to whom the Profession is under great obligation, observes, that if the advance of consideration, generally, will not prevent the legal right, the mere inequality of proportion, which may naturally be attributed to the relative value of the lives, cannot have that effect. See 9 Ves. jun. 597, n.(b). The distinction, however, seems founded on rational grounds. Where the parties advance the money equally, it may be fairly presumed that they purchased with a view to the benefit of survivorship; but where the money is advanced in unequal proportions, and no express intention appears to benefit the one advancing the smaller proportion, it is fair to presume that no such intention existed; the inequality of proportion can scarcely be attributed to the relative

money are not equal and this appears in the deed itself, this makes them in the nature of partners (*b*); and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others in proportion to the sums advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it (*c*).

And where the money is advanced in equal proportions, so that the purchasers are joint tenants in equity as well as at law, a conveyance by the purchasers to a trustee without any consideration, and without any express intent to sever the joint tenancy, will not have that effect; but the trust-estate will go to the survivor in the same manner as the legal estate would have done (*d*).

In all cases of a joint undertaking, or partnership, although the estate will survive at law, yet the survivor will in equity be a trustee for the representative of the deceased partner.

Thus, in a case (*e*) where five persons purchased lands in fee of the commissioners of sewers, and in order to improve and cultivate these lands afterwards entered into articles, whereby they agreed to be equally concerned as to profit and loss, and to advance each of them such a

(*b*) See 2 Ves. 258.

pendix, No. 21.

(*c*) *Per* Master of the Rolls, in case *Lake v. Gibson*, 1 Eq. Ca. Abr. 290, pl. 3.

(*e*) *Lake v. Gibson*, *ubi sup.* and see *Hayes v. Kingdome*, 1 Vern. 33; *Jeffereys v. Small*, 1 Vern.

(*d*) *Rea v. Williams*, MS. Ap- 217.

value of the lives, because neither of the parties can be supposed not to know, that the other may, immediately after the purchase, compel a legal partition of the estate, or may even sever the joint tenancy by a clandestine act.

sum, to be laid out in the manurance and improvement of the land, it was held by the Master of the Rolls that they were tenants in common, and not joint tenants, as to the beneficial interest, and that the survivor should not go away with the whole ; for then it might happen that some might have paid or laid out their share of the money, and others, who had laid out nothing, go away with the whole. And the decree was affirmed by Lord Chancellor King (*f*).

So where two persons took a building-lease, and laid out money in erecting houses, they were held to be partners with respect to this property : and the survivor was decreed to be a trustee of a moiety for the representatives of the deceased (*g*).

But as the lands will survive at law, equity, on the general rule, that he who seeks equity shall do equity, will not relieve, unless the person seeking relief will do what he equitably ought to do.

Thus, in the first-mentioned case, the ancestor of the party seeking relief had quitted the concern for many years ; since which time the other proprietors, to enable them to carry on their design, had purchased some other estates, which proved a losing concern ; and the plaintiff was only relieved on contributing his share of the purchase-money of the estates so bought, with interest from the time the money ought to have been paid (*h*).

Lord Chancellor King said, that this was plainly a tenancy in common in equity, though otherwise at law ; and the defendant Craddock having only a title in equity, that he must do equity ; and that this was equitable in all its branches ; for he had his election to drop all claim, or

(*f*) *Lake v. Craddock*, 3 P.Wms. 158 ; S. C. MS.

and *Elliot v. Brown*, 9 Ves. jun. 597, cited.

(*g*) *Lyster v. Dolland*, 1 Ves. jun. 431. See 2 Ves. jun. 631 ;

(*h*) And see *Senhouse v. Christian*, 19 Ves. 157, cited.

between their real and personal representatives, the primary fund for payment of the mortgage-money (*n*).

It seems that where two or more persons purchase an estate, and one, for instance, pays all the money, and the estate is conveyed to them both, the one who paid the money cannot call upon those who paid no part of it to repay him their shares of the purchase-money, or to convey their shares of the estate to him : for by payment of all the money he gains neither a lien nor a mortgage, because there is no contract for either ; nor can it be construed a resulting trust, as such a trust cannot arise at an after-period ; and perhaps the only remedy he has, is to file a bill against them for a contribution (*o*). Whenever, therefore, two persons agree to purchase an estate, it should be stipulated in the agreement, that if by the default of either of them the other shall be compelled to pay the whole, or greater part of the purchase-money, the estate shall be conveyed to him, and he shall hold the entirety against the other and his heirs, unless he or they shall, within a stated time, repay the sum advanced on their account, with interest in the mean time.

But it has been held, that if one of two joint tenants of a lease renew, at his own expense, and the other party reap the full benefit of it, the one advancing the money shall have a charge on the other moiety of the estate, for a moiety of his advances on account of the fines, although such other moiety of the estate be in strict settlement at the time of the renewal. The case was considered to fall within the principle upon which mortgagees who renew

(*n*) Forrester v. Lord Leigh, Ambl. 171. *Vide supra*, p. 179.

(*o*) See Wood v. Birch, and Wood v. Norman, Rolls, 7 and 8 March 1804 ; the decree in which

case does not, however, authorize the observation, but the author conceives it to follow, from what fell from the Master of the Rolls at the hearing.

leasehold interests have been decreed entitled to charge the amount upon the lands (*p*).

Where two or more persons purchase an estate, and the conveyance is taken in the name of one of them, the trust may be proved by letters written subsequently to the purchase; for the statute of frauds (*q*) does not require that a trust shall be created by a writing (*r*); but that it shall be *manifested and proved* by writing, which means that there should be evidence in writing, proving that there was such a trust (*s*).

But although two persons enter into a treaty for the purchase of an estate, and one of them desists, and permits the other to go on with the intended purchase, on his promising, by parol, to let him have the part of the estate he desired, yet it seems that this agreement cannot be enforced on account of the statute of frauds.

In *Lamas v. Baily* (*t*), which was a case of this nature, the plaintiff obtained a decree at the Rolls, it being insisted, that although it was an agreement parol, yet it was in part executed by the plaintiff's desisting from prosecuting his purchase, who otherwise might have purchased for himself, or at least have enhanced the price the defendant was to pay, so that the defendant had a benefit by it; and besides, it was a fraud (*u*), and like the case where a man agreed to purchase as agent for another, and would afterwards retain the purchase to himself. But upon an appeal to the Lord Chancellor, the decree was reversed, as being a parol agreement within the provision of the statute against frauds.

(*p*) *Hamilton v. Denny*, 1 Ball 696; 5 Ves. jun. 308; *Randall & Beatty*, 199. *v. Morgan*, 12 Ves. jun. 67.

(*q*) 29 Car. II. c. 3, s. 7.

(*t*) 2 Vern. 627; and see *Riddle*

(*r*) See n. (1) to the last edit. of *Gilb. on Uses*, p. 111.

v. Emerson, 1 Vern. 106.

(*u*) See *Thyan v. Thynn*, 1 Vern.

(*s*) *Forster v. Hale*, 3 Ves. jun. 206.

Mr. Powell (*x*) refers to an anonymous case in Viner (*y*), which he conceives to be another report of the case of *Lamas v. Baily*, where the Lord Chancellor dismissed the bill because there was no *absolute and positive* agreement; but the words were ambiguous and uncertain, and the statute intended to oust as well all such ambiguous agreements, as to prevent perjuries, &c., and this agreement would not bind, unless it were in writing. And Mr. Powell, therefore, conceives that the judgment turned on there being no *absolute* or *positive* agreement, the words being ambiguous and uncertain; and not on the ground that the forbearing by agreement to do an act might not be a part performance, and raise as strong an equity to have the benefit stipulated in return, as an act done.

In the later case of *Atkins v. Rowe* (*z*), some persons desirous of obtaining a lease of three houses, agreed that one of them should bid for all the houses, but that the lease should be for their joint benefit. Accordingly he bid, and a lease was made to him; and to a bill filed by the others to have the benefit of the lease, and that the purchaser might be decreed a trustee, he pleaded the statute of frauds in bar both to the discovery and relief. But the Lord Chancellor seemed of opinion, that the agreement, although by parol, was not within the statute, and ordered the plea to stand for an answer, with liberty to except, and the benefit of the plea to be saved to the hearing. Thus the case is reported in Moseley. It appears from the cases in the House of Lords (*a*), that the defendant by his answer denied the agreement, and the cause being at issue, several witnesses were examined on

(*x*) 1 Powell on Contracts, 310.

(*y*) 5 Vin. Abr. 521, pl. 32.

Note, the case of *Lamas v. Baily* is stated in the same page.

(*z*) Mose. 39; and see *Crop v. Norton*, stated *infra*.

(*a*) Cases, *Dom. Proc.* 1730.

both sides. There was a contrariety of evidence, but the plaintiff proved the agreement by one positive witness, corroborated by circumstances. But the Chancellor dismissed the bill without costs, and his decree was affirmed by the House of Lords.

Upon the whole, therefore, the better opinion perhaps is, that an agreement of this nature cannot be enforced, although certainly it does not appear that the precise point has ever been decided upon an absolute agreement clearly and undeniably proved.

From the case of *Smith, treasurer of the West-India Dock Company v. the Mayor and Corporation of London*(*b*), it should seem, that where two persons agree to purchase an estate, and one of them, by agreement between them, completes the purchase, and pays the money, the other must agree to accept the title, and pay his share of the purchase-money, before he can call for an inspection of the title-deeds, in order to investigate the title; unless the one who purchased can be charged with such gross negligence, or wilful default, as will strip an agent, as such, of the protection which that character gives him in all transactions in which he duly acts according to his agency: and in case any such gross negligence or wilful default can be proved, the injured party will have a remedy in equity, although he may have paid his share of the purchase-money.

SECTION II.

Of Purchases in the Names of Third Persons.

I. IF a man purchase an estate, and do not take the conveyance in his own name only, the clear result of all

(*b*) Ch. Dec. 16, 1801, and many previous days, MS.

the cases, without a single exception, is, that the trust of the legal estate, whether freehold, copyhold or leasehold ; whether taken in the name of the purchaser and others jointly, or in the names of others, without that of the purchaser ; whether in one name or several ; whether jointly or *successive*, results to the man who advances the purchase-money(c), unless such a resulting trust would break in upon the policy of an act of parliament(d). And although the person in whose name the conveyance is taken executes no declaration of trust, yet a trust will result for the person who paid the money by operation of law ; this species of trust being expressly excepted out of the statute of frauds(e).

But, unless the trust arise on the face of the deed itself, the proofs must be very clear(f) : and however clear they may be, it seems doubtful whether parol evidence is admissible against the answer of the trustee denying the trust(g). And in cases of this nature the claimant, in opposition to the legal title, should not delay asserting

(c) *Per* Lord C. B. Eyre, in *Dyer v. Dyer*, stated *infra*.

(d) See *ex parte* Houghton, 17 Ves. jun. 251 ; and see *Redington v. Redington*, 3 Ridg. P. C. 106.

(e) 29 Car. II. c. 3, s. 8. See *Hungate v. Hungate*, Toth. 184 ; *Gascoigne v. Thwing*, 1 Vern. 366 ; *Howe v. Howe*, 1 Vern. 415 ; *Anon.* 2 Ventr. 361, n. (3) ; *O'Hara v. O'Neil*, 21 Vin. Abr. 497, n. ; 2 Bro. P. C. 39 ; *Pelly v. Maddin*, 21 Vin. Abr. 498, pl. 15 ; *Sir Darcy Lever v. Andrews*, 7 Bro. P. C. by Tomlins, 288 ; *Ambrose v. Ambrose*, 1 P. Wms. 321 ; *ex parte* Vernon, 2 P. Wms. 549 ; *Smith v. Baker*, 1 Atk. 385 ; *Lloyd v. Spillet*, 2 Atk. 148 ; *Withers v. Withers*,

Ambl. 15 ; *Lade v. Lade*, 1 Wils. 21 ; *Smith v. Lord Camelford*, 2 Ves. jun. 713 ; *Rider v. Kidder*, 10 Ves. jun. 360.

(f) *Gascoigne v. Thwing*, 1 Vern. 366 ; *Newton v. Preston*, Prec. Cha. 103 ; *Willis v. Willis*, 2 Atk. 71 ; and see 1 Atk. 60 ; *Ambl.* 414 ; *Acherley v. Acherley*, 4 Bro. P. C. 67 ; and *Smith v. Wilkinson*, 3 Ves. jun. 705, cited ; and 1 Dick. 328 ; and see *Lench v. Lench*, 10 Ves. jun. 511.

(g) *Skett v. Whitmore*, 2 Freem. 289 ; *Newton v. Preston*, Prec. Cha. 103. See *Cottingham v. Fletcher*, 2 Atk. 155 ; *Bartlett v. Pickersgill*, 4 East, 577, n. (b).

his right, as a stale claim would meet with little attention (*h*).

It has been said (*i*), that if the consideration-money is *expressed* in the deed to be paid by the person in whose name the conveyance is taken, and nothing appears in such a conveyance to create a presumption that the purchase-money belonged to another, then parol proof cannot be admitted, *after the death of the nominal purchaser*, to prove a resulting trust; for that would be contrary to the statute of frauds and perjuries.

This proposition has been adopted by another writer(*k*), who says, that it should seem, that even the confession of the trust by the nominal purchaser, to countervail a declaration in writing, and create a trust for the party advancing the money, cannot be established by a third person, but must be made under *a judicial examination upon oath, or by the party's own answer in equity*. This, he adds, seems understood both in the case of *Ambrose v. Ambrose*, and *Ryall v. Ryall*; and appears to flow from the proposition before stated; for, during the life of the nominal purchaser, no proof can be received of his parol confession, as not being the best existing evidence; and after his death, it is mere parol evidence contradicting the deed, and not of strength to raise a resulting trust.

In the first edition of this work the author submitted it as his opinion, that the proposition, that parol proof could not be admitted after the death of the nominal purchaser, was not warranted by the authorities referred to in support of it (*l*), and that the statute is not more broken in upon

(*h*) *Delane v. Delane*, 7 Bro. P. C. by Tomlins, 279.

(*i*) See Mr. Sanders's note to *Lloyd v. Spillet*, 2 Atk. 150; and see his *Essay on Uses*, I. 123; and see the 3d edit. of that work, p. 259, 260.

(*k*) *Rob. on Stat. of Frauds*, 99.

(*l*) *Kirk v. Webb*, Prec. Cha. 84; *Walter de Chirton's case*, cited *ib.*; *Newton v. Preston*, Prec. Cha. 133; *Gascoigne v. Thwing*, 1 Vern. 366; *Hooper v. Eyles*, 2 Vern. 480; *Crop v. Norton*, 2 Atk. 74.

by admitting parol proof after the death of the nominal purchaser, than it is by allowing such proof in his lifetime. And this opinion seems to be confirmed by the cases of *Lench v. Lench* (*m*). The question there was, whether a purchase by the late husband of the plaintiff of an estate was made with some trust-money of hers, of which he had obtained possession. Parol evidence was admitted of conversations with the husband, in order to prove the fact. Sir Wm. Grant, Master of the Rolls, after premising that there was not only no covenant by the husband to purchase land, but no stipulation in the settlement that land should be purchased, but merely a proviso, that the trustees, with the wife's consent alone, might invest the money in land, said, that as to the ground that the purchase was made with the trust-money, all depended upon the proof of the fact, *for whatever doubts might have been formerly entertained on this subject, it is now settled, that money may in this manner be followed into the land in which it is invested; and a claim of this sort may be supported by parol evidence.*—His Honor then examined the weight of the testimony, which he held to be too contradictory and uncertain to be depended upon. So, in Sir John Peachy's case (*n*), Sir Thomas Clark, Master of the Rolls, laid it down, that frauds were out of the statute of frauds, for that the Judges had resolved it was absurd that a statute which was made to prevent frauds should be made a handle to support them. And therefore, if *A* sold an estate to *C*, and the consideration was expressed to be paid by *B*, and the conveyance made to *B*, the Court would allow parol evidence to prove the money paid by *C*.

Where the evidence is merely parol, although it is

(*m*) See *Lench v. Lench*, 10 Ves. jun. 511. The point, I am told, was lately decided the same way in Ireland.

(*n*) Rolls, E. T. 1759, MS.

clearly admissible, yet it will be received with great caution. Evidence of naked declarations made by the purchaser himself is, as Sir William Grant observed, in all cases, most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration.

So Lord Hardwicke laid it down that parol evidence might be admitted to show the trust, from the mean circumstances of the pretended owner of the real estate or inheritance, which makes it impossible for him to be the purchaser (*o*).

An express trust, although by parol only, will prevent the resulting trust (*p*); because resulting trusts are left by the statute of frauds and perjuries as they were before; and, previously to the act, a bare declaration by parol would prevent any resulting trust. Besides, an equitable presumption may be rebutted by parol evidence (*q*); for, as Lord Mansfield has observed, an equitable presumption is only a kind of *arbitrary implication* raised, to stand until some *reasonable proof* brought to the contrary.

Therefore parol evidence will be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially; and if satisfactory, he will be entitled to the estate (*r*); but the proof rests upon him to show, that the man from whom the con-

(*o*) Willis v. Willis, 2 Atk. 71; and see Ryall v. Ryall, 1 Atk. 59; Ambl. 413; and Lench v. Lench, 10 Ves. jun. 511.

(*p*) Lady Bellasis v. Compton, 2 Vern. 294. See Lord Altham v. the Earl of Anglesea, Gilb. Eq. Rep. 16; Roe v. Popham, Dougl. 25.

(*q*) Langfield v. Hodges, Lofft, 230; Rider v. Kidder, 10 Ves. jun. 360.

(*r*) Taylor v. Alston, cited in Dyer v. Dyer, Watk. Copyh. 216; S. C. MS.; Goodright v. Hodges, *ibid.* 227; Lofft, 230; 2 East, 534, n.; Maddison v. Andrews, 1 Ves. 57.

sideration moved did not mean to purchase in trust for himself, but intended a gift to the stranger (*s*).

Where a man merely employs another person by parol, as an agent to buy an estate, who buys it accordingly, *and no part of the purchase-money is paid by the principal*, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds (*t*).

And although the agent be afterwards convicted of perjury in denying the trust, yet that will not enable the Court to decree a performance *in specie* (*u*); and, therefore, as the principal cannot avail himself, in any civil proceeding, of the conviction of the agent, he is a competent witness to prove the perjury (*x*).

In *Crop v. Norton* (*y*), Lord Hardwicke appears to have been of opinion, that this doctrine of resulting trust only extended to cases where the whole consideration is paid by one person, and the conveyance taken in the name of the other. He said, "this is where the whole consideration moves from such person; but I never knew it where the consideration moved from several persons; for this would introduce all the mischief which the statute of frauds was intended to prevent. Suppose several persons agree to purchase an estate in the name of one, and the purchase-money appears to be paid by him only, I do not know any case where such persons shall come into this Court, and say they paid the purchase-money; but it is expected there should be a declaration of trust."

In the case of *Wray v. Steel*, the point called for a de-

(*s*) See 3 Ridg. P. C. 178.

(*t*) *Bartlett v. Pickersgill*, 4 Burr. 2255; 4 East, 577, n. (*b*). See *Rastel v. Hutchinson*, 1 Dick. 44.

(*u*) *Bartlett v. Pickersgill*, *ubi sup.*

(*x*) *The King v. Boston*, 4 East, 572. See *Fell v. Chamberlain*, 2 Dick. 484, *supra*, p. 106; and see *the King v. Dalby*, Peake's Ca. 12, and the cases cited in the note.

(*y*) 9 Mod. 233.

an advancement for them, but a trust for the father (*g*), and there seems some ground to support this distinction ; because the father could not have taken the whole estate in his own name.

But this decision has been overruled, and it is now settled, that such a purchase is, upon the general rule, an advancement for the children, and not a trust for the father (*h*), where the grant is immediate to the children, or even to the father for their lives, if they can, according to the custom of the manor, take at law under such a grant (*i*) : nor is it material that the purchase is of a reversion expectant upon the death of a stranger (*j*).

A purchase by a papist incapable of purchasing, in the name of a protestant son, is a stronger case for an advancement than a purchase by a protestant parent ; because otherwise a constructive trust prohibited by statute would be raised (*k*).

It has already been observed, that to make it an advancement, the child must be unadvanced ; but an advancement in part is not material (*l*) ; and a child having only a reversion expectant upon a life-estate, will be considered as unadvanced (*m*) ; and even if the child be advanced, yet if the father consider him unadvanced, that will be sufficient (*n*).

If the child is already provided for, and the father did not consider him unadvanced (*o*), or if the father con-

(*g*) Dickenson v. Shaw, cited in Dyer v. Dyer, Watk. Copyh. 216 ; S. C. MS.

(*h*) Dyer v. Dyer, *ubi sup.* ; and see Swift v. Davis, 8 East, 354, n.

(*i*) See Right v. Bawden, 3 East, 260 ; Smartle v. Penhallow, Lord Raym. 994.

(*j*) Finch v. Finch, 15 Ves. jun. 43.

(*k*) Redington v. Redington,

3 Ridg. P. C. 106. See *ex parte* Houghton, 17 Ves. jun. 251. 10 Geo. 4.

(*l*) See Rep. t. Finch, 326.

(*m*) Lamplugh v. Lamplugh, 1 P. Wms. 111.

(*n*) Redington v. Redington, *ubi sup.*

(*o*) Elliot v. Elliot, 2 Cha. Ca. 231.

Possession by the father, during the infancy of his child(*t*), will not be deemed subversive of the child's claim; for it cannot be supposed the parent would have named a youth as a trustee; and therefore his taking the profits must be intended to have been done by him as guardian to the son. In an early case(*u*), indeed, the tender years of the child was considered as evidence that the father did not purchase for his benefit, because he was too young to need an advancement.

A distinction has been drawn where the parent has taken the profit after the child's coming of age, and when of discretion to claim his right(*v*); in which case, it is said, the child shall be a trustee for the father. But this cannot be depended on. It seldom happens that the father gives the son possession during his life; and yet, as the Court observed, in the case of *Lord Grey v. Lady Grey* (*x*), in all cases whatsoever, where a trust shall be between the father and son, contrary to the consideration and operation of law, the same ought to appear upon very plain and coherent and binding evidence, and not by any argument or inference from the father's continuing in possession, and receiving the profits, which sometimes the son may not in good manners contradict, especially where he is advanced but in part.

So the circumstance of the parent laying out money in repairs and improvements will not make the child a trustee(*y*).

(*t*) See *Finch*, 340, 341; *Lamplugh v. Lamplugh*, 1 P. Wms. 112; *Mumma v. Mumma*, 2 Vern. 19; *Redington v. Redington*, 3 Ridg. P. C. 106. Note, the case of the Attorney-general *v. Bagg*, Hard. 135, turned on fraud.

(*u*) *Sir George Binion v. Stone*, Nels. Cha. Rep. 68; 2 Freem. 169.

See *King v. Denison*, 1 Ves. & Bea. 260.

(*v*) *Lloyd v. Read*, 1 P. Wms. 608; and see *Gilb. Lex Prætoria*, 271.

(*x*) Rep. *t.* *Finch*, 340.

(*y*) *Shales v. Shales*, 2 Freem. 252; *Mumma v. Mumma*, 2 Vern. 19.

A declaration of trust by the father, *subsequently* to the conveyance, will not divest the gift to the child (*z*); and therefore a devise by him of the estate will be inoperative (*a*).

It is, however, quite clear, that according to the general rule of equity, if the father devise to another the estate bought in the name of the child, and make other provision for the child by his will, he would at this day be put to his election; although in the early case of *Shales v. Shales* (*b*), where these circumstances occurred the child was not put to his election.

If the conveyance of the fee to a son is proved to be for a particular purpose, as to sever a joint-tenancy, the child will be a trustee for the father (*c*).

A purchase by a father, in the joint names of *himself* and son, will be considered as an advancement for the child, if he is unprovided for; and consequently equity will not assist to defeat his legal claim (*d*).

But a purchase in the names of father and son, as joint-tenants, has not been considered so strong a case for an advancement as it formerly was; it is said, that it does not answer the purpose of an advancement, for it entitles the father to the possession of the whole till a division, and to a moiety absolutely even after a division, besides the father's taking a chance to himself of being a survivor of the other moiety: nay, if the son dies during his minority, the father would be entitled to the whole by virtue of the survivorship, and the son could not have prevented it by

(*z*) *Woodman v. Morrell*, 2 Freem. 32; *Elliot v. Elliot*, 2 Cha. Ca. 231. See *Redington v. Redington*, 3 Ridgw. P. C. 106.

(*a*) *Mumma v. Mumma*, 2 Vern. 19; *Dyer v. Dyer*, Watk. Copyh. 216; S. C. MS.

(*b*) 2 Freem. 252.

(*c*) *Baylis v. Newton*, 2 Vern. 28; and see *Birch v. Blagrove*, Ambl. 264; Sir Walter Raleigh's case, Hard. 497, cited.

(*d*) *Scroope v. Scroope*, 1 Cha. Ca. 27.

severance, he being an infant (*e*). And accordingly, in a case (*f*) where a father purchased an estate in the names of himself and son, and had *no other estate* to which a judgment-creditor could resort, the creditor was relieved in equity against the survivorship at law; the settlement being considered as voluntary and fraudulent against creditors (*g*).

But there does not appear to be much weight in the reasons above stated. It is evident that a moiety of some estates may be a much better provision than the entirety of others. The chance of survivorship which the father takes is an incident to the tenancy, and extends equally to the son, who, after he attains his majority, may sever the joint tenancy. If he die during his minority, it is as well that the estate should survive to the father, who paid the purchase-money, and perhaps took the conveyance to himself and son as joint tenants, with the express view of advancing him only in the event of his attaining that age at which the law considers a man capable of managing his fortune. During the son's minority and the life of his father, upon whom should he be dependent if not upon his own parent? If the father die during the son's minority, the estate will survive to him; so that, perhaps, it is impossible to contend with success, that a purchase by a parent in the name of himself and child, as joint tenants, is not as strong a case for an advancement as a purchase in the name of the child solely. Fraud is of course an exception to every rule.

A purchase in the name of a child solely, or jointly with the parent's name, is not, however, within the 27 Eliz. (*h*),

(*e*) *Per* Lord Hardwicke, 2 Atk. 480; and see *Pole v. Pole*, 1 Ves. 76.

(*f*) *Stileman v. Ashdown*, 2 Atk. 477.

(*g*) See 13 Eliz. c. 5.

(*h*) C. 4.

And therefore a subsequent purchaser, although *bond fide*, will not be relieved against it (*i*).

But such a purchase fell expressly within the letter of the 21st of James I. (*j*) if the father was a trader at the time; and his being solvent would not protect the purchase (*k*). But if the purchase was made before the father engaged in trade, and without any fraudulent purpose of becoming a bankrupt, it would have been good, although the father afterwards commenced tradesman, and was made a bankrupt (*l*).

The law was partially altered by the 6 Geo. 4, c. 16, s. 73, which only gives to the creditors the benefit of the purchase, where the bankrupt *is at the time insolvent*. It deserves serious consideration whether the law should not be restored.

If the father be dead, a purchase by the grandfather, in the name of his grandchild, is subject to the same rules as govern a purchase by a father in the name of his child; for on the death of the father, the grandchild is under the protection of the grandfather (*m*); but in *Lloyd v. Read* (*n*) this distinction does not seem to have been attended to. The case, however, depended upon its own peculiar circumstances.

So a purchase by a husband in the name of his wife is also deemed an advancement and provision for her (*o*). But if a purchase in the name of wife or child be after marriage, and voluntary, it may perhaps be fraudulent as

(*i*) *Lady Gorge's case*, 3 Cro. 550, cited.

(*j*) C. 15, s. 5. See *Walker v. Burrows*, 1 Atk. 93.

(*k*) *Fryer v. Flood*, 1 Bro. C. C. 160; *Glaister v. Hewer*, 8 Ves. jun. 195.

(*l*) *Crisp v. Pratt*, Cro. Car. 548;

Lilly v. Osborn, 3 P. Wms. 293; and see 8 Ves. jun. 200, 204.

(*m*) *Ebrand v. Dancer*, 2 Cha. Ca. 26.

(*n*) 1 P. Wms. 608.

(*o*) *Kingdome v. Bridges, Back v. Andrews*, 2 Vern. 67, 120.

against creditors (*p*), in like manner as if the settlement was of property actually vested in the husband, in even which case it seems that the husband must be proved to have been indebted at the time of the settlement to the extent of insolvency, in order to affect the settlement (*q*). It has, however, been strenuously argued, that a *purchase* is not within the operation of the statute of 13 Eliz. ; for, as the purchaser may give the money to the object of his bounty to purchase the estate for himself, he may by the same reason direct a conveyance to be made to him ; and this seems to be the better opinion, where the case is clear of actual fraud (*r*).

A purchase by a *trader* in the name of his wife seems subject to the same rules as a purchase by a trader in the name of his child (*s*). But a purchase by a trader of the land-tax on his wife's estate, for her benefit (*t*), or of an enfranchisement of his wife's copyhold estate, or money laid out by him in building on her estate, being mere voluntary expenditure, cannot be made a ground of charge against her or her estate by his creditors, although he was insolvent at the time (*u*).

On this subject it remains only to remark, that Lord Chief Baron Gilbert observes (*x*), that a difference is taken between a purchase in the name of a son and of a daughter ; for though sons are often provided for by settlement of lands, yet daughters seldom are, therefore the presumption is not so strong. The learned author does not, however, refer to any case in support of his position ; and in

(*p*) Christ's Hospital v. Budgin, 2 Vern. 683.

(*q*) See Lush v. Wilkinson, 5 Ves. jun. 384.

(*r*) See Fletcher v. Sidley, 2 Vern. 490 ; Proctor v. Warren, Sel. Cha. Ca. 78 ; and 8 Ves. jun. 199.

(*s*) See Glaister v. Hewer, 8 Ves. jun. 195 ; 9 Ves. jun. 12 ; 11 Ves. jun. 377.

(*t*) Burrough's case, 17 Ves. jun. 267, cited.

(*u*) Campion v. Cotton, 17 Ves. jun. 263.

(*x*) Lex Prætoria, 272.

Lady Gorge's case she appears to have enjoyed an estate purchased by her father, the Earl of Lincoln, in her name (*y*). Indeed, admitting the *general* rule, as to providing for daughters by settlement of lands, *where there is a son*; yet, in the case under consideration, the purchase itself is strong evidence of the intent, more especially as a woman is an unfit trustee of a real estate, as she might marry, and then a conveyance of the estate could not be obtained without a fine.

SECTION III.

Of Purchases with Trust Money.

If a trustee, or executor, purchase estates with his trust-money or assets, and take the conveyance in his own name, without the trust appearing on the face of the deeds, the estates will not be liable to the trusts, although he die insolvent, unless the application of the purchase-money can be clearly proved. And the same principle applies to a purchase by a husband with trust-money belonging to his wife, of which he may have obtained possession from the trustee, whether with or without the wife's consent; or to a purchase by an agent or steward with monies remitted to him by his principal (*z*).

In the old cases (*a*) the courts of equity were much more strict in the proof they admitted of the application of the money than they now are; but it was always very clear, that upon sufficient proof of the trust-money having been

(*y*) Lady Gorge's case, 3 Cro. 84; Heron v. Heron, Prec. Cha. 550, cited. 163; Halcot v. Markant, Prec.

(*z*) Bennet v. Mayhew, 1 Bro. Cha. 168; Kendar v. Milward, C. C. 232; 2 Bro. C. C. 287, cited. 2 Vern. 440; Prec. Cha. 171. See

(*a*) Kirk v. Webb, Prec. Cha. Cox v. Bateman, 2 Ves. 19.

laid out in the purchase of the estate, a trust would result and be decreed accordingly (*b*). Parol evidence is, in these cases, admissible either in the life-time, or after the decease of the trustee: but unless there are corroborating circumstances, as a writing under the trustee's hand, stating the application of the money, or the inability of the trustee to make the purchase with other funds (*c*), mere parol evidence of declarations supposed to be made by the purchaser will be received with great caution.

Where a trustee or agent is bound by the trust to lay out the money in land, if he lay it out accordingly, it will be presumed to have been done in execution of the trust (*d*).

But if a trustee has considered himself entitled to the trust-money for his own benefit, no presumption can be raised in opposition to this fact, that he intended any lands he may have bought with the trust-money to be subject to the trust (*e*).

Here we may introduce a case, where a man, on his marriage, contracted to assure all such personal estate as he should, during the joint lives of him and his wife, be possessed of, upon certain trusts. He purchased a real estate, for which he paid partly out of his own monies, and partly out of monies borrowed on his personal security. It was insisted, that the real estate was bound by the trusts: but Lord Eldon determined, that it be-

(*b*) Anon. Sel. Cha. Ca. 57; Lane v. Dighton, Ambl. 409; Balgney v. Hamilton, cited *ibid.*; Ryall v. Ryall, 1 Atk. 59; Ambl. 413; and see Earl of Plymouth v. Hickman, 2 Vern. 167.

(*c*) See Lench v. Lench, 10 Ves. jun. 511; Wilson v. Foreman, 2 Dick. 593, as corrected by the Master of the Rolls, 10 Ves. jun.

519; and see Anon. Sel. Cha. Ca. 57.

(*d*) See the cases in Sect. 4, *infra*.

(*e*) Perry v. Phelps, 4 Ves. jun. 108; 17 Ves. jun. 173; and see Cox v. Paxton, 17 Ves. jun. 329; Savage v. Carroll, 1 Ball & Beatty, 265; *supra*, p. 171.

shall be presumed to have done it with such intention (*i*). Therefore, where the covenantor has purchased lands, but not of sufficient amount to wholly perform the covenant, yet they shall go in performance of it as far as they will extend (*k*). It may not be possible to lay out all the money in one purchase; but that is not a sufficient reason why the estates actually purchased should descend to the heir at law for his own benefit, to the entire ruin, perhaps, of the rest of the family.

The like principle has been extended to a case where the covenantor was to *pay* the money to *trustees*, to be by them laid out in the purchase of estates (*l*).

It is not material in these cases, that the purchase was to be made with the consent of persons whose consent was never even applied for (*m*), or within a limited time, and the purchase was not made till after the expiration of the time appointed (*n*). Nor is it important that there was a subsisting mortgage on the estate, upon which the covenantor took up money from another person in order to enable him to complete the purchase (*o*). And it will not vary the case, that the covenantor had an option to settle a rentcharge instead of the lands themselves, unless he have shown an intention to avail himself of his right to elect (*p*).

But where a clear intent appears to *lay out* the entire sum in the *future* purchase of lands, estates of which the

(*i*) See *Sowden v. Sowden*, Cox's n. 3 P. Wms. 228.

(*k*) *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211; For. 80; MS. App. No. 22, a fuller note of this part of Lord Talbot's judgment; *Whorwood v. Whorwood*, 1 Ves. 540; *Sowden v. Sowden*, 3 P. Wms. 228, n.; 1 Bro. C. C. 582. See 4 Ves. jun. 116, 117; 10 Ves. jun.

9. 516; *Gardner v. Lord Townsend*, Coop. 301.

(*l*) *Sowden v. Sowden*, 1 Bro. C. C. 582.

(*m*) *Lechmere v. Earl of Carlisle*, *ubi sup.*

(*n*) S. C.; and see 3 Atk. 329.

(*o*) *Deacon v. Smith*, 3 Atk. 323.

(*p*) *Ibid.*

covenantor was seised at the time of the covenant, and which he permitted to descend, cannot go in performance of the agreement, because such clearly could not have been his intention (*q*).

And, to enure as a performance, the property purchased must be such as will answer the intent of the settlement (*r*). Therefore, under a covenant to purchase fee simple lands in possession, estates in reversion, expectant upon lives will not go in performance (*s*), unless, perhaps, they fall into possession in the covenantor's life-time; neither will leaseholds for lives, nor terms of years, even with covenants to purchase the fee, go in performance, as they cannot descend to the heir (*t*).

So a moiety of a house would not be considered a kind of property within a covenant to purchase lands of inheritance: nor would lands, having a different descent, as borough English lands, which descend to the youngest son, instead of lands descendible to the eldest son, according to the course of the common law (*u*). Neither will copyhold estates go in part performance of a covenant to purchase freehold lands, where the nature of the tenure would prevent compliance with the terms of the settlement, as where the estate is to be settled on one for life *without impeachment of waste* (*x*). But where this circumstance does not occur, copyhold estates may, it should seem, go in part performance of a covenant to purchase real estates (*y*), although Lord Hardwicke seems to have doubted whether

(*q*) *Lechmere v. Earl of Carlisle*, For. 80, *et ubi sup.* See *Davys v. Howard*, 5 Bro. P. C. 552.

(*r*) See *Lewes v. Hill*, 1 Ves. 274.

(*s*) *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211; *Deacon v. Smith*, 3 Atk. 323; *Whorwood v. Whorwood*, 1 Ves. 540.

(*t*) *Lechmere v. Earl of Carlisle*, *ubi sup.*

(*u*) *Pennill v. Hallett*, Ambl.

106.

(*x*) *Ibid.*

(*y*) *Wilks v. Wilks*, 5 Vin. Abr. 293, fol. 39. Note, the covenant was generally to purchase lands.

copyhold lands could go in performance, as they are liable to different tenures and to forfeiture (z).

Where the purchase was made *bond fide* with an intent to perform the covenant, the lands must, it is conceived, in most cases be taken at the price paid for them (a), or at least at their value at that time. This construction, however, is not made to the prejudice of purchasers, for if the covenantor sell the estates, it will be evidence of his intention that they should not be bound by the settlement, and therefore they could not be followed in the hands of the purchaser (b). But it is no objection in these cases that the arrangement will affect specialty creditors, for it is in the power of the owner of the estate to prefer one specialty creditor to another, because none of them have any specific lien on the lands (c).

It may be considered as a general rule, although it may not hold universally true, that a covenant to convey and settle lands, will not be a specific lien on the lands of the covenantor, but the covenantee will be a creditor by specialty. In one case, where a man gave a bond, before marriage, to convey sufficient freehold or copyhold estates, to raise 600 *l.* per annum, for his intended wife, in bar of dower, she was decreed to be a creditor, by specialty of her husband, and to be entitled to be paid the arrears of her annuity out of his personal estate, in a course of administration; and if the same should not be sufficient, then out of the real estates of which he died seised in fee-simple, *and if those should not be sufficient, then out of the real estates in settlement of which he was tenant in tail, provided such deficiencies did not exceed the amount of the dower which she would have been entitled to thereout,*

(z) Whorwood v. Whorwood,
1 Ves. 540.

(a) Lechmere v. Earl of Carlisle,
For. 80. See and consider Pennill

r. Hallett, Ambl. 106.

(b) Smith r. Deacon, 3 Atk. 323.

(c) S. C.

CHAPTER XVI.

OF THE PROTECTION AND RELIEF AFFORDED TO
PURCHASERS BY STATUTES, AND BY THE RULES OF
EQUITY.

IN the former chapters an attempt has been made to trace the purchase from its inception by contract, to its completion by conveyance ; the subjects which may be said to arise out of the conveyance have been treated of ; and it has been considered who are incapable of purchasing estates. Let us now suppose the purchase to be completed, and proceed to inquire to what protection and relief purchasers are entitled. The protection and relief afforded to purchasers appear to arise either from positive statutes, or from the rules of equity. The common law hath, indeed, done all which, from its peculiar nature, it can do in support of the claims of *bonâ fide* purchasers ; for we are told, that the maxims of the common law, which refer to descents, discontinuances, non-claims, and to collateral warranties, are only the wise arts and intentions of the law to protect the possession, and strengthen the rights of purchasers (*a*). Lord Mansfield indeed held, that in every case between purchasers for valuable consideration, a court of equity must *follow*, and not *lead* the law. And the rules of equity were, in his time, pretty generally adopted in the courts of law (*b*). It could not long escape

(*a*) Finch, 104. See Bac. on Uses, 36.

This practice did not escape the inquiring eye of Junius ; see vol. 2.

(*b*) Keech v. Hall, Dougl. 22 ; Weakley v. Bucknell, Cowp. 473.

ments, with any clause of revocation or alteration at his pleasure of such conveyance, &c. and shall afterwards sell the same to any person or persons for money or other good consideration paid or given (the said first conveyance, &c. not being revoked according to the power reserved by the said *secret* conveyance, &c.) then the said first conveyance, &c., as touching the lands, tenements and hereditaments so after sold, against the vendees, &c. shall be deemed and be void, and of none effect; provided that no *bonâ fide* mortgage should be affected by the act.

To take advantage of this statute, a person must have purchased *bonâ fide*, and for a valuable consideration, but the Court will not enter into the adequacy of the consideration, unless it was so small as to be palpably fraudulent (*e*). Whatever consideration would be sufficient to support an original settlement will be sufficient to avoid a prior voluntary one. The subject of the sale must, however, be an existing lawful interest. Thus in a case mentioned by Sir Edward Coke, in his Commentary on Littleton (*f*), *A* had a lease of certain lands for sixty years, if he lived so long, and forged a lease for ninety years absolutely, and he by indenture reciting the forged lease, for valuable consideration, bargained and sold the forged lease, and all his interest in the land to *B*. Sir Edward Coke adds, that it seemed to him that *B* was no purchaser within the statute of 27 Eliz., for he contracted not for the true and lawful interest, for that was not known to him; for then perhaps he would not have dealt for it, and the visible and known term was forged; and although by general words the true interest passed, notwithstand-

(*e*) Upton v. Bassett, Cro. Eliz. 444; Doe v. Routledge, Cowp. 705; Needham v. Beaumont, 3 Rep. 83, b; 2 And. 233; Doe v. Routledge, Cowp. 705. See Bullock v. Sadlier, Ambl. 764; Hill v. Bishop

of Exeter, 2 Taunt. 69; Doe v. James, 16 East, 212. See 1 Ves. & Beam. 184; Treatise of Powers, 4th ed. p. 418.

(*f*) Co. Litt. 3, b. See Hatton v. Jones, Bull. N. P. 90.

It hath been determined (*k*), that notice to a purchaser of a fraudulent conveyance is of no consequence, for the statute makes it absolutely void.

A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debts expressed, is a fraudulent conveyance within this statute, against a subsequent purchaser for valuable consideration (*l*).

But if the conveyance were made with an honest intent, and the purchaser had notice of the trust, it seems that he will not be relieved against it (*m*). And upon the whole, as Mr. Roberts justly remarks (*n*), these are cases of such danger to purchasers, that a prudent adviser can hardly recommend a title which has been at all the subject of arrangements for the payment of debts remaining unsatisfied.

II. It has in numerous cases been holden, that voluntary settlements are within the meaning of the act, although the purchaser had direct notice of the settlement at the time of his purchase. This doctrine has, however, been frequently questioned, but appears to have been incontrovertibly settled by the case of *Taylor v. Stile* (*o*), which arose in Yorkshire.

In that case, *A* settled lands, after his marriage, on his wife for life, and then sold the lands to *B*, who had notice of the wife's estate for life, and took counsel's opinion on the point. *A* died, and his wife brought her bill to be let into her life estate. Lord Northington held the law to be clear, that a subsequent purchaser for a valuable con-

(*k*) *Gooch's case*, 5 Co. 60, a.

(*l*) *Leech v. Leech*, 1 Cha. Ca. 249. See *Wallwyn v. Coutts*, 3 Mer. 707.

(*m*) *Langton v. Tracey*, 2 Cha. Rep 16. See *Stevenson v. Hay-*

ward, Prec. Cha. 310.

(*n*) Vol. Conv. 335.

(*o*) Chancery, 1763, MS.; and see *Evelyn v. Templar*, 2 Bro. C. C. 148.

settlement, and what will be deemed a valuable consideration within the act, so as to protect a settlement against subsequent purchasers.

Any conveyance executed by a husband in favour of his wife or children, after marriage, which rests wholly on the moral duty of a husband or parent to provide for his wife and issue, is voluntary, and void against purchasers by force of the act (*u*).

But a *purchase* in the name of a wife or child is not within the intention of the act, and consequently cannot be defeated by a subsequent purchaser (*x*): and on the ground of policy it seems, that a settlement by a widow, previously to her second marriage, of her estate on the children of the first marriage, will not be deemed fraudulent (*y*).

And a settlement made on a wife or children, *prior* to marriage, is a conveyance for valuable consideration, by reason of the marriage itself (*z*), but a settlement after a marriage in Scotland, will not be deemed a settlement upon valuable consideration, although, subsequently to it, the marriage is re-celebrated in England (*a*).

The marriage consideration runs through the whole settlement, as far as it relates to the husband, and wife, and issue (*b*). Whether the marriage consideration will extend to remainders to collateral relations, so as to support them against a subsequent sale to a *bonâ fide* purchaser, is a subject which has been frequently discussed (*c*).

(*u*) Woodie's case, cited in Colvile v. Parker, Cro. Jac. 158; Goodright v. Moses, 2 Blackst. 1019; Chapman v. Emery, Cowp. 278; Evelyn v. Templar, 2 Bro. C. C. 148. See Parker v. Serjeant, Finch, 146.

(*x*) *Supra*, ch. 15, s. 2, div. 11.

(*y*) Newstead v. Searles, 1 Atk. 265. See Cowp. 280; Cotton

v. King, 2 P. Wms. 674.

(*z*) Colvile v. Parker, Cro. Jac. 158; Douglas v. Ward, 1 Cha. Ca. 99; Brown v. Jones, 1 Atk. 188.

(*a*) *Ex parte* Hall, 1 Ves. & Beam. 112.

(*b*) Nairn v. Prowse, 6 Ves. jun. 752.

(*c*) See 6 Ves. jun. 750; 18 Ves. jun. 92.

In a case in Lane (*d*), it is stated to have been held, that “if a man doth, in consideration that his son shall marry the daughter of *B*, covenant to stand seised to the use of the son, for life, and after to the use of other his sons, in reversion or remainder; these uses, thus limited in remainder, are fraudulent against a purchaser, though the first be upon good consideration, viz. marriage.”—In this case, therefore, although the settler was under a moral obligation to provide for his sons, yet the remainders were not held good. They were, it will be observed, to take effect after a vested estate for life only. The case of Jenkins & Keymis (*e*) has sometimes been considered a case, where the consideration of a marriage, and marriage portion, was held to run through all the estates raised by the settlement on the marriage, though the marriage was not concerned in them (*f*). The point, however, was not decided. It was merely the inclination of Hale’s opinion. It was not necessary to decide the point, for Sir Nicholas was tenant for life, and Charles tenant in tail, with remainders over; the concurrence of both, therefore, was essential to give effect to the settlement, which brings it within the rule laid down in *Roe v. Mitton* (*g*). Besides, the son paid to his father the portion which he received with his wife (*h*). Lord Keeper Bridgman is also reported, by Levinz, to have agreed with Hale, that the marriage and portion of the first wife would extend to the issue of the second; but this opinion was extrajudicial, inasmuch as he relieved against the defective execution of the power (*i*); and it is observable, that no such opinion was stated in the report in Chancery (*k*). The case of *Whit*

(*d*) Lane, 22; and see 2 Ro. Rep. 306; *Jason v. Jervis*, 1 Vern. 286.

(*e*) 1 Lev. 150. 237; 1 Cha. Ca. 105.

(*f*) See 9 East, 69.

(*g*) *Vide infra*, and 18 Ves. ju.

92.

(*h*) See 1 Cha. Ca. 103.

(*i*) See 1 Lev. 237.

(*k*) See 1 Cha. Ca. 105.

and Stringer (*l*) does appear to be an authority for such limitations, after a *vested* estate-tail; *the remoteness of the remainder was much relied upon in its favour*. But even in that case there were special circumstances; the remainder was excepted in the purchase deed, and the purchaser took a collateral security against it. It may be thought, therefore, that he only purchased the reversion in fee which was in the settler from whom he bought. The case of Osgood *v.* Strode (*m*), like Jenkins and Keymis, depends on the circumstance, that the father and son had each an interest in the estate, and one could not make the settlement without the other. Lord Macclesfield, however, considered the marriage portion not to go beyond the limitations to the husband, and wife, and issue; and his subsequent observations are addressed to creditors, and not to *purchasers*. The case of Roe and Mitton (*n*) depends on the same principle, and is so far an authority against the validity of the remainders, that the marriage consideration, alone, was not considered sufficient to support the limitations to the brothers. Lord Eldon has observed (*o*), that in the case of a father, tenant for life, with remainder to his son in tail, they may agree, upon the marriage of the son, to settle, not only upon his issue, but upon the brothers and uncles of that son: and the question would be, whether they, *though not within the consideration of the marriage*, are not within the contract between the father and son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other, "I will not agree unless you will so settle." The Court, his Lordship added, has held such a claim not to be that of a mere volunteer, but as falling within the range of the considera-

(*l*) 2 Lev. 105. See 2 P. Wms. 255.

(*n*) 2 Wils. 356.

(*o*) 18 Ves. jun. 92.

(*m*) 2 P. Wms. 245.

In the above case, therefore, the limitations to the collaterals were supported : but it is observable, that in order to support the limitations to the daughters of the first marriage, it was necessary to support the remainders to the sons of the second marriage. That was of itself a sufficient ground to support the remainders. It has, on the same principle, been considered, that an estate to a stranger may be supported, under a covenant to stand seised, if required to give effect to subsequent limitations within the consideration.

The same circumstances precisely, however, appear to have occurred in *Roe v. Mitton*, but this ground does not appear to have been urged in its support. It was decided, upon the ground before mentioned : and Lord C. J. Wilmot said, that the whole of the question turned upon that. It is scarcely possible to suppose that the question was not discussed at the bar.

In a recent case, in Ireland (*s*), the precise point seems to arise, although the facts are very numerous. In a settlement, previous to marriage, after the limitations to the issue of the marriage, which failed, remainders to the collateral relations of the settler were added, under which the grandson of an *uncle* of the settler claimed. The settler sold the estate to a purchaser, with full notice of the settlement. Upon a trial in the Court of Common Pleas, in Ireland, Lord Norbury, C. J. and Mr. Justice Mayne, were in favour of the defendant : and Mr. Justice Fox, and Mr. Justice Fletcher, in favour of the plaintiff. The latter, *pro forma*, allowed his opinion to be entered up for the defendant, and a writ of error was accordingly brought ; but the author has not learned how the point was finally decided.

Since the above observations were written, the case

(*s*) *Fairfield v. Birch*. The special verdict is shortly stated in Appendix, No. 23.

supported as if a bill had been brought against the husband to make a provision for his wife (*y*).

So the concurrence of the wife in destroying an existing settlement on her for the benefit of the husband, is a sufficient consideration for a new settlement, although much more valuable than the former (*z*). And the better opinion, as well upon principle as in point of authority seems to be, that the wife joining in barring her dower, for the benefit of her husband, will be a sufficient consideration for a settlement on her (*a*). It has been decided, that the wife parting with her jointure is a sufficient consideration. Now, if that which comes in lieu of dower is a valuable consideration, surely the dower itself must be equally valuable. Besides, where a woman is entitled to dower, the estate cannot be sold to advantage without her concurrence; she is a necessary party to any arrangement respecting the estate, and that alone seems a sufficient ground to support a settlement on her.

But if an unreasonable settlement be made upon a wife in consideration of her releasing her dower, it seems that equity in favour of subsequent purchasers will restrain her to her dower (*b*).

If, upon a separation, the husband settle an estate upon his wife, and a friend of her's covenant to indemnify the husband against any debts which she may contract, this will be a sufficient consideration to uphold a settlement as valuable, and not within the statute (*c*). Indeed, the

(*y*) *Brown v. Jones*, 1 Atk. 188.

(*z*) *Scott v. Bell*, 2 Lev. 70;
Ball v. Bumford, Prec. Cha. 113;
1 Eq. Ca. Abr. 354, pl. 5. See
Clerk v. Nettleship, 2 Lev. 148.

(*a*) *Lavender v. Blackstone*, 2
Lev. 146. See and consider *Evelyn v. Templar*, 2 Bro. C. C. 148;
18 Ves jun. 91; *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

(*b*) *Dolin v. Coltman*, 1 Vern.
294.

(*c*) *Stephens v. Olive*, 2 Bro. C.
C. 90; *King v. Brewer*, *ibid.* 93, n.
See however Lord Eldon's argu-
ment in *Lord St. John v. Lady St.*
John, 11 Ves. jun. 526; *Worrall*
v. Jacob, 3 Mer. 256.

enter and make a feoffment for valuable consideration, the feoffee of the first feoffee shall hold the lands, and not the feoffee of the first feoffor: for although the estate of the first feoffee was in its creation covinous, or voluntary, and therefore voidable, yet when he enfeoffed a person for valuable consideration, such person shall be preferred before the last (*g*).

Lord Eldon has applied this rule to persons having only equitable rights. For where a person who had an absolute power of appointment over a sum of money to be raised under a trust-term, directed part of it to be raised in favour of a volunteer, who afterwards mortgaged such part, although the money appointed was deemed assets as between the creditors of the appointor and the appointee, yet the claim of the purchaser was preferred to that of the creditors: he having a preferable equity (*h*).

If a voluntary grantee gain credit by the conveyance to him, and a person is induced to marry him on account of such provision, the deed, though void in its creation as to purchasers, will, on the marriage being solemnized, no longer remain voluntary, as it was in its creation, but will be considered as made upon valuable consideration (*i*).

And it is to be inferred from a late decision (*k*), that though it does not appear, that the friends of the wife did speculate upon the provision, and take it into considera-

(*g*) *Prodgers v. Langham*, 1 Sid. 133; *Kirk v. Clark*, Prec. Cha. 275; *S. C.* by the name of *Heisier v. Clark*, 2 Eq. Ca. Abr. 46, pl. 13; *Doe v. Routledge*, Cowp. 705; *East India Company v. Clavell*, Gilb. Eq. Rep. 37; Prec. Cha. 377; and see 9 Ves. jun. 193; *O'Gorman v. Comyn*, 2 Scho. & Lef. 147; *Crofton v. Ormsby*, *ibid.* 583.

(*h*) *George v. Milbank*, 9 Ves. jun. 190. See 1 Mer. 638.

(*k*) *Brown v. Carter*, 5 Ves. jun. 862.

(*i*) *Prodgers v. Langham*, 1 Sid. 133.

relied on. Indeed, if notice of a settlement apparently voluntary, but which turns out to be made on valuable consideration, should not be deemed notice to a purchaser, of the consideration, yet, unless he has a prior legal estate, he cannot protect himself against the settlement. Both parties being purchasers, equity must stand neuter, and the person claiming under the conveyance must recover at law.

There are but few cases on the effect of an *agreement* by the settler to sell an estate after a voluntary settlement of it. In *Leach v. Dean* (o), the plaintiff's suit was to be relieved upon articles of agreement for the purchase of lands from the defendant, who before the articles had by deed conveyed the estate to his son, and the Court made the decree as prayed; "but as to the voluntary conveyance, the same is not hereby impeached, as between the father and son for any advancement, or any other thing thereby settled on the son, other than making good the articles of agreement; but the trustees to be paid their debts and engagements out of the purchase-money." It does not appear that the purchaser had notice of the settlement at the time he contracted. It was altogether a voluntary settlement. So in *Douglasse v. Ward* (p), the settlement was after the settler's first marriage on himself for life, remainder to his first and other sons in tail, and was therefore voluntary throughout. Previously to his second marriage, in consideration of a portion, he agreed to settle a jointure on his second wife, out of the settled estate, and she was relieved against her own issue, who claimed under the settlement. It does not appear that she had notice of the settlement, and at the time of her articles there was no person *in esse* entitled under the settlement, and the settler himself could have destroyed

(o) 1 Cha. Rep. 78.

(p) 1 Cha. Ca. 99.

compel a specific performance in favour of a purchaser who bought *with notice* of a prior voluntary conveyance made without fraud. But in a recent case, where, after a voluntary settlement, the settler entered into a contract to sell the settled estate to a person with full notice of the settlement, the Master of the Rolls, on mature consideration, decreed a specific performance against the parties claiming under the voluntary settlement (*t*); and Lord Eldon appears to have approved of the decision (*u*), but his Lordship was not called upon to consider the point. It is certainly a very strong decision. The construction that a *bond fide* voluntary settlement was void under the statute against a subsequent purchaser, who bought with notice, was not established without great opposition, and has always been considered a harsh interpretation. But the statute only operates where the purchaser acquires the estate under a conveyance. Equity generally follows the law; and therefore a sale of an equitable estate must, like a sale of a legal estate, operate to defeat a prior voluntary settlement; but that rule does not seem to apply to this case, where the contracting party has all his legal right, and the question is not in what channel an equitable interest actually *in esse* shall go, but whether the purchaser has any equitable interest, or, in other words, whether the Court will lend him its extraordinary aid, in order to carry the contract into a specific execution, instead of leaving him to his remedy at law. It were difficult to maintain, that the statute requires, by implication, equity to interpose, or that the interposition of the Court is called for by analogy to the legal rule; and unless that could be established the plaintiff in such a suit might, with propriety, be told that he did not come there with clean hands. He knew that the seller had already settled

(*t*) *Buckle v. Mitchell*, 18 Ves. jun. 101.

(*u*) *Metcalf v. Pulvertoft*, 1 Ves. & Beam. 180.

point arose. The bill was filed by the seller, who made the voluntary settlement. The defendant, the purchaser, bought without notice. He raised the objection to the title on account of the settlement by his answer, but submitted to perform the contract if a good title could be made. Sir Wm. Grant, Master of the Rolls, in a judgment which will long be remembered by those who heard it, expressly distinguished the case from his former decision in *Buckle and Mitchell*, and decided that the settler cannot maintain a bill for a specific performance. For the settlement was binding on him, and he had no right to disturb it.

In the later case of *Johnson v. Legard*, the settlement was in consideration of a marriage, and was not voluntary throughout. By an agreement in writing, in October 1807, Sir John Legard, the settler, agreed to sell and convey the estate to Mr. Watt, before the 6th of April 1808. And Mr. Watt agreed to secure, by mortgage of the estate and his bond, the purchase money with interest; which principal sum was to remain upon the security at interest during the life of Sir John Legard, and for twelve calendar months afterwards. And it was agreed, that if Watt, his heirs or assigns, should be evicted from or deprived of the possession of the estate by any issue male of Sir John Legard, *or by any other person claiming or deriving title under him*, then the sums laid out in improvements or necessary alterations were to be repaid with interest, and also the purchase-money; and the security for any part unpaid was to be void. Sir John Legard died. His creditors filed a bill against the remainder-men under the settlement, and against Watt, praying a specific performance. Watt by his answer objected to the title on account of the settlement, but submitted to perform the agreement on having a good title. By the decree it was ordered, that a case should be made for the opinion of the Judges of the

opinion that the creditors might file a bill although the settler could not, as there was a moral obligation on him to provide for his debts, and that the Court could make a decree between the co-defendants. For the remainder-men it was insisted, that the settler having solemnly on his marriage settled the estate, in default of his own issue, on the person who would succeed to his title, had already performed a moral obligation, and exhausted his power over the estate. The settlement was binding on him, and his creditors could not, claiming under him, have any rights to which he was not entitled. They did not attempt to impeach the settlement under the 13 Eliz. It was also submitted, that it would be an act of injustice to extend the rule as to decreeing relief between co-defendants to this case, because it at once took the estate from the remainder-men without any consideration. It did not follow that Watt the purchaser would file a bill; and if he did, the co-defendants might shape their defence in a way which they had not by the present bill been called upon to do. The Vice-Chancellor held, that the statute of 27 Elizabeth did not confine the relief to a purchaser *by conveyance*, but the act supposed there may be a purchaser *by contract*. The purchaser's right follows as against the representatives of the vendor. His Honor thought that the creditors would have a right to insist upon a specific performance, though the vendor had not; but that point did not arise, for Mr. Watt says he is ready to take the estate if a good title can be made. Besides, the former decree concluded every question now raised. The defendants, the remainder-men, have appealed to the Lord Chancellor against this decision. Since the publication of the last edition the appeal has been heard and the decree below reversed (*b*).

(*b*) It is now reported, 1 Turn. & Russ. 281.

purchaser (*g*), and no artifice of the parties can protect the settlement. Therefore, although the power is conditional, that the settler shall only revoke on payment of a trifling sum to a third person (*h*), or with the consent of any third person who is merely appointed by the grantor (*i*), in these and the like cases the condition will be deemed colourable, and the settlement will be void against a subsequent purchaser.

But if a settlement is made with a power to the settler to revoke, so as that the money be paid to trustees to be invested in the purchase of other estates (*k*), or to revoke with the consent of a stranger *bonâ fide* appointed by the parties, and his consent is made requisite, not as a mere colour, but for the benefit of all parties, the settlement will be valid, and cannot be impeached by a subsequent purchaser (*l*). This was determined in the case of *Buller v. Waterhouse* (*m*), which, however, Mr. Powell thought, did not settle the point, *because all the claimants under the conveyance were purchasers for a valuable consideration* (*n*). But it seems quite immaterial whether the settlement itself is merely voluntary, or upon valuable consideration (*o*). The statute says, that all conveyances which the grantor has power to revoke shall be void against subsequent purchasers; and therefore, if parties giving a valuable consideration for a settlement choose to permit the grantor to reserve a power to revoke the settlement, they must suffer for their folly. The grantor, by virtue of

(*g*) *Cross v. Faustenditch*, Cro. Jac. 180; *Tarback v. Marbury*, 2 Vern. 510. See Lane, 22.

(*h*) *Griffin v. Stanhope*, Cro. Jac. 454.

(*i*) See 3 Rep. 82, b.; *Lavender v. Blackston*, 3 Keb. 526.

(*k*) *Doe v. Martin*, 4 Term Rep. 39.

(*l*) See *Leigh v. Winter*, 1 Jo. 411; and see Lane, 22.

(*m*) 2 Jo. 94; 3 Keb. 751; and see acc. *Hungerford v. Earle*, 2 Freem. 120; Lane, 22.

(*n*) Pow. on Powers, 330.

(*o*) See acc. Rob. on Vol. Conv. 637.

is, where the first conveyance is not revoked according to the power. The act has no effect until the donee of the power sell the estate without revoking the first conveyance by virtue of his power. Suppose, then, a vendor professes to execute his power, but it is informally exercised, will the defect be cured by the statute? The Legislature intended to protect purchasers against fraudulent settlements with powers of revocation, for it is essential, to bring a case within the act, that the estate should be sold, and the first conveyance not be revoked according to the power reserved to the grantor by such *secret* conveyance. The non-execution of the power is the fraud which the statute intended to avoid. The conveyances against which the act was intended to operate were presumed to be *secret*. It was not meant to relieve any man who was aware of the existence of the power, and might have required it to be exercised. *The statute was not intended to operate as a mode of conveyance.* But without insisting that where a purchaser is aware of the settlement, he must require the power to be executed, it may be urged, that where a purchaser does rest his title on the execution of the power, he rejects the aid of the Legislature, and takes his title *under and not in opposition to* the settlement; and can, therefore, only stand in the same situation as any other purchaser who has unfortunately taken an estate under a power defectively executed. The purchaser can scarcely be held to have a good legal title, unless the vendor not only attempted to execute the power, but actually conveyed the estate to him.

SECTION II.

Of Protection from Charitable Uses.

IN the statute of charitable uses (*r*) is a proviso that no person who shall purchase or obtain, upon valuable consideration of money or land, any estate or interest of or in any lands, &c. that shall be given to any of the charitable uses mentioned in the statute, without fraud or covin (*having no notice of the same charitable uses*), shall be impeached by any decrees of the commissioners therein mentioned.

A purchaser who hath bought for an inadequate consideration is not within this proviso; and the adequacy of the consideration is measured according to the rule of the civil law; but if one purchase lands under half the value, and sell to another upon good consideration *bond fide*, the fraud is purged (*s*).

If a rent-charge be granted out of land to a charitable use, and the land is afterwards sold for valuable consideration to one who has no notice, it has been said the rent remains; because the purchase was of another thing that was not given to the charitable use (*t*): but in *Tothil* (*u*) the same case is referred to as an authority, that a purchaser coming in without notice of a rent-charge shall not be chargeable therewith, although given to a charitable use. The correct distinction seems to be, that where the rent-charge is legal, it must, like every other *legal* incumbrance, bind the purchaser, although he pur-

(*r*) 43 Eliz. c. 4.Duke, 64; and see *Peacock v. Thewer*, Duke, 82.(*s*) *Vide supra*, p. 252; Duke, 177.(*u*) *Toth.* 226.(*t*) *East Greenstead's case*,

chased without notice ; but that where it is a mere equitable charge, the commissioners shall not make any decree for payment of it against the purchaser, if he purchased without notice.

If the first purchaser gave a valuable consideration, and yet had notice, all that claim in privity under his estate and title, whether they have notice or not, will be bound by the decrees of the commissioners (*x*).

This rule, as we shall hereafter see, differs from the general rule of equity in this respect—a subsequent purchaser without notice not being affected by notice in the person of whom he purchased.

With this exception, however, the same rules seem to prevail in the construction of the act, with respect to notice, as are generally adopted by equity (*y*).

SECTION III.

Of Protection from Acts of Bankruptcy.

I. By the statute 13 Eliz. c. 7, a purchaser would be defeated, although there should be forty years after an act of bankruptcy, and before a commission ; and although the purchaser had no notice ; for the words of the statute are general *after bankruptcy*, and the proviso in the end of the statute makes it still plainer, viz. : *That assurances made by a bankrupt before bankruptcy, and bonâ fide, shall not be defeated.*—This was hard doctrine against fair purchasers without notice ; but so the law was (*z*.)

With a view to prevent this injustice, and at the same time to preserve to creditors their just rights, and perhaps

(*x*) East Greenstead's case, Duke, 64 ; and see *ibid.* 173.

(*y*) *Ibid.*

(*z*) See For. 66, 67.

tors were not parties to the deed ; and this opinion appears to be adopted in practice.

To avoid a purchase, the act of bankruptcy must be committed within five years before the commission (*e*). The five years are, however, computed from the last act of bankruptcy preceding the sale ; for the words of the statute are not after he shall first be a bankrupt, but only after becoming bankrupt generally (*f*) : and, therefore, if after several acts of bankruptcy an estate is sold by the bankrupt, and a commission issues within five years from the last act, the sale will be avoided (*g*). But no act of bankruptcy *after* the sale will affect the purchaser ; and consequently his title will not be impeached by any commission issued after five years from the act of bankruptcy immediately preceding the sale (*h*).

II. Thus the law stood until Romilly's act for amending the laws relating to bankrupts (*i*), by which, after reciting that great inconveniences and injustice had been occasioned by reason of the fair and honest dealings and transactions of and with traders being defeated by *secret* acts of bankruptcy, in cases not already provided for, or not sufficiently provided for by law, it was enacted, that in all cases of commissions *thereafter* to be issued, all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with, any bankrupt *bonâ fide* made or entered into more than two calendar months before the date of such commission, should, notwithstanding any

(*e*) Radford v. Bloodworth, 1 Lev. 13.

(*f*) Spencer v. Venacre, 1 Keb. 722 ; 1 Lev. 14.

(*g*) Jelliff v. Horn, 1 Keb. 12, cited. Radford v. Bloodworth 1

(*h*) Spencer v. Venacre, 1 Keb. 722 ; and see Cullen's B. L. 241.

(*i*) 46 Geo. III. c. 135, extended to executions and attachments by 49 Geo. III. c. 121, s. 2.

be bound by the constructive notice established by the late act, where he does not claim the benefit of it. Thus, if it should appear that a commission had been issued or a docket struck prior to the purchase, the purchaser could not claim the benefit of the late act, although he had not actual notice of the commission or docket; but if more than five years had elapsed since the purchase, and a new commission were then to issue, it should seem that he may insist upon the benefit of the act of James. So where a purchaser *bonâ fide*, and without notice, has a prior legal estate, he may, notwithstanding either of the acts, make use of it as a protection against the assignees. The grounds of this opinion upon the late act are, that it was passed in favour of purchasers; that it does not say *affirmatively*, that a commission issued two months after a conveyance *shall* bind where a commission has been issued, or a docket struck prior to the purchase, but merely enacts *negatively*, that a commission issued after that time *shall not* bind, unless a commission was issued or a docket struck before the purchase.

The express enactment, that the striking a docket or issuing a commission shall operate as a constructive notice to purchasers, seems to exclude all other kinds of constructive notice, so far as any aid is sought from this statute: the Legislature having expressly declared that these two particular acts shall be deemed constructive notice, it must be inferred that they intended no other act should have that effect. Therefore there is ground to contend, that if a commission has not been issued or a docket struck, a purchaser may avail himself of the statute, although, for instance, his solicitor had express notice that the vendor had committed an act of bankruptcy. Against this construction, it might, perhaps, be argued, that as neither the striking of a docket, nor the issuing of a commission, was

of payment, and that he is not to be considered as solvent because possibly his affairs may come round.

The provision, that the *issuing* of a commission shall be notice, although such commission shall afterwards be superseded, extends even to a commission which has been superseded, without being opened, although it was contended, that the Legislature must have meant a commission opened, and acted upon, though afterwards superseded (*p*).

III. The law has again been altered by the act of the 6th of the present King. The observations already made show how the law stood before that act, which is still necessary to be known.

The act referred to contains the following provisions relating to purchasers :

1. By the 81st section (*q*) it is enacted, that all conveyances by, and all contracts and other dealings and transactions by and with, any bankrupt *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against, and all executions and attachments against, the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account, such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing or transaction, or at the time of executing or levying such execution or attachment, notice (*r*) of any prior act of bankruptcy by

(*p*) Watkins v. Maund, 3 Camp. Ca. 308.

(*r*) That he was insolvent or had stopped payment omitted.

(*q*) 6 Geo. IV. c. 16.

him committed (*s*); provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing or transaction, execution or attachment, shall be valid, unless made, entered into, executed or levied more than two calendar months before the issuing the first commission.

2. And by section 83 it is enacted, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing the commission), if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same (*t*).

3. And by s. 85 it is enacted, that if any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company shall be thereby deemed to have had such notice (*u*).

4. And by the 86th section it is enacted, that no purchase from any bankrupt, *bonâ fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy, by such bankrupt committed, shall be impeached by reason thereof, unless the commission against such bankrupt shall have been sued out within twelve calendar months (*x*) after such act of bankruptcy (*y*).

(*s*) 46 G. III. c. 135, s. 1, and
49 Geo. III. c. 121, s. 2.

(*t*) See *Spratt v. Nothouse*,
4 Bing. 173.

(*u*) *Ibid.*

(*x*) Instead of five years.

(*y*) 21 Jac. I. c. 19, s. 14.

5. And by the 87th section it is enacted, that no title to any real or personal estate sold under any commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out of the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same within twelve calendar months from the issuing thereof.

6. And it is enacted by section 4, that where any trader within the act, shall, after the act shall have come into effect (I), execute any conveyance or assignment by deed to a trustee or trustees of all his estate and effects for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader; provided that such deed shall be executed by every such trustee within fifteen days after the execution thereof by the said trader; and that the execution by such trader, and by every such trustee, be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper published near to such trader's residence, and such notice shall contain the date and execu-

(I) By s. 136 it is provided, that the act shall not take effect before the 1st September 1825, save and except that the repeal of the act passed in the 5th year of the reign of His present Majesty thereby repealed, and all enactments therein contained relating to certificates of conformity, shall take effect upon the passing of this act.

fiction of law, whereby judgments were supposed to be all of the first day of the term, by compelling the party to set down the particular period when the judgment was signed, and declaring that, as against purchasers *bonâ fide* for a valuable consideration, the lands, tenements and hereditaments to be charged thereby, should be charged only from such time as the judgment was signed ; yet, inasmuch as it did not compel the plaintiff to carry in the judgment roll, purchasers and others were rendered almost incapable of discovering what judgments were recovered (*x*).

And, therefore, by another statute (*y*) it was enacted, that the clerk of the essoigns of the Court of C. B. the clerk of the doggets of the Court of B. R. and the master of the office of pleas in the Court of Exchequer, should make and put into an alphabetical dogget, by the defendants names, of all the judgments entered in their respective Courts of Michaelmas and Hilary terms, before the last day of the ensuing terms ; and of the judgments of Easter and Trinity terms, before the last day of Michaelmas term ; and that no judgments should affect lands or tenements as to *bonâ fide* purchasers for valuable consideration, unless docketed and entered according to the act ; and it is directed that every dogget shall be put into and kept in books in parchment, to be searched by all persons, at reasonable times, paying fourpence for searching every term.

“ Dockets or indexes to judgments were in use long before this statute. They were invented by the Courts for their own ease, and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large. The statute of William and Mary did not super-

(*x*) Robinson v. Harrington, 1 Pow. Mort. 518, 4th edit. S. C. MS.

(*y*) 4 and 5 W. and M. c. 20, made perpetual by 7 and 8 W. III. c. 36, s. 3.

Mary, till before the last day of the subsequent term. And there is no inconvenience in this rule, for I find, upon inquiry, that the practice is to index judgments as soon as they are signed, in order to enable purchasers to search for them with facility. But this practice is wholly independent of the directions of the act by which judgments are required to be docketed.

Although a judgment is not duly docketed, and therefore void against a purchaser, yet if the purchaser has notice of it, and did not pay the value of the estate, it will be presumed that he agreed to pay off the judgment, and equity will compel him to pay it (*e*).

The general rule of equity would warrant an assertion, that the case would be the same although no agreement were made. In the case of *Forshall v. Coles* (*f*), however, it appears that the Master of the Rolls held decidedly that notice of a judgment not docketed was not material. But this decision cannot be relied on: the effect of it would be to overrule all the decisions on the statutes for registry (*g*). They were passed for precisely the same purpose as the act of William and Mary, viz. to enable purchasers readily to discover incumbrances; and therefore, if a purchaser has notice of any judgment, the statute does not in equity extend to him, as he is already in possession of what the Legislature intended to furnish him with. This point, upon which a considerable difference of opinion recently prevailed in the Profession, has lately been decided by Lord Eldon in favour of the judgment creditor. The case of *Forshall v. Coles* is therefore overruled (*h*).

(*e*) *Thomas v. Pledwell*, 7 Vin. Abr. 53, pl. 5; 2 Eq. Ca. Abr. 684, pl. 7.

(*f*) 7 Vin. Abr. 54, pl. 6; 2 Eq. Ca. Abr. 592, pl. 8; S. C. MS.

a better note, Appendix, No. 19.

(*g*) *Vide infra*, sect. 5.

(*h*) *Davis v. Earl of Strathmore*, 16 Ves. jun. 419.

and therefore might be considered as an escrow (*o*) ; and even if it operated to vest the legal estate in the purchaser, yet the case was within the spirit and meaning of the act of James ; because the estate in effect formed part of the property to be distributed. Upon these grounds the assignees filed a bill against the purchaser for a specific performance ; but the Master of the Rolls thought the title too doubtful to enable him to force it on the purchaser.

In a later case, however (*p*,) where a man agreed to sell his estate, and became a bankrupt before the conveyance was executed, the same learned Judge held that the assignees of the seller could make a title without the concurrence of judgment creditors whose judgments were duly docketed before the bankruptcy.

The 21 Jac. I. c. 24, which enables persons to have new execution against the property of debtors dying in execution, provides, that the act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be in execution, and die in execution, to have or take any new execution against any the lands, tenements or hereditaments of such party dying in execution, which shall at any time after the said judgment or judgments be by him sold *bonâ fide* for the payment of any of his creditors, and the money which shall be paid for the lands so sold either paid or secured to be paid to any of his creditors, with their privity and consent, in discharge of his or their due debts, or of some part thereof.

(*o*) Derby Canal Company v. purchaser's solicitor.

Wilmot, 8 East, 360. See O'Dell
v. Wake, 3 Camp. 394, where the
deed was in the possession of the

(*p*) Sharpe v. Roahde, 2 Rose,
192.

II. Formerly, if goods had vacation, a *fieri facias* tested th have over-reached the sale, altho to it (*q*).

To remedy this inconvenience no writ of *fieri facias*, or other v bind the property of *goods* aga execution was sued forth, but fro should be delivered to the sheriff, to be executed ; and for the be said time, the sheriff, under-shu deputies and agents, should upon writ, without fee for doing the back thereof the day of the mont they received the same (I).

It has been said (*s*), that the provision was to secure purchas cution, against any former writ delivered to the sheriff. But a j execution was always protected which he had no notice, by the r of the statute of frauds (*t*) ; and appears to be the correct one.

It has been doubted whether the act referred to, extends to l appears by two opinions publish

(*q*) *Houghton v. Rushley*, Skin. Hu 257 ; and see Comb. 145 ; 2 Ventr. Rej 218. (

(*r*) 29 Car. II. c. 3, s. 16. han

(*s*) *Per Ashhurst, J. in casu* 419

(I) This statute only operates in favo passed for the benefit of the debtor. I Norden v. Needham, Pasch. 3 W. & M. it was held that deeds and writings could

vations on Registry, that Mr. Serjeant Hill thought it did not include leaseholds, but that they might be extended on a writ of *elegit*; and consequently were bound from the time the judgment was duly entered and docketed; and that, on the other hand, Mr. Butler thought the word “goods” did comprise leaseholds, which therefore were not bound until delivery to the sheriff of the writ of execution.

It must be admitted, that a leasehold for years may be extended on an *elegit*, if it is in the possession of the defendant at the time execution is awarded (*u*). It was, however, settled long before the statute of Charles II. that a sale of chattels was good after judgment, although not after execution awarded (*x*); so that as to a term of years the command to the sheriff in an *elegit* does not overreach the sale in the same manner as it does in the case of a freehold estate. This distinction appears to have been expressly taken in Fleetwood’s case.

With respect to judgments, the statute of frauds hath two branches: the one relating to judgments against real estate; the other relating to executions on judgments against goods or personal estate. The act being a remedial one, the mode of discovering whether leaseholds are bound by the last provision, seems to be, first, an inquiry whether purchasers of leaseholds were within the mischief the Legislature intended to guard against; and if they were, then an inquiry whether the word “goods” is sufficiently comprehensive to effectuate the intention of the act.

(*u*) Sir Gerard Fleetwood’s case, 8 Co. 171; and see and consider 31 Ass. p. 6; 38 Ass. p. 4; and see 2 Inst. 395; Gilb. Ex. 33. 35. The author fell into an error in this respect in the first edition.

(*x*) Sir Gerard Fleetwood’s case, 8 Co. 171; and see 1 Fitz. Abr. tit. Execution, pl. 108; 2 Ro. Abr. 157; Wilson v. Wormol, Godb. 161, pl. 226; Shirley v. Watts, 3 Atk. 200.

First, the act was passed for the benefit of purchasers; and admitting that the act is bound from the award of execution, the first provision in the act does not apply to those which are, therefore, clearly warranted to be guarded against by the act. If any of them is liable to be overtaken by vacation, and tested in the present state, it is not held leaseholds to be within the scope of the act, purchasers of leaseholds are to the danger which the statute is intended to guard against.

Assuming that leaseholds are not within the scope of the act, it remains to inquire whether they are within the scope of the act. This depends upon the construction of the word "goods," in the act, ought to be construed.

Biens, bona, Sir Edward Coke says, are both chattels, as well real as personal. The French word, and signifies goods, in our law we call *catalla*. And this observation (z), is true if understood in the *Grand Coustumier* (y) where the word is used and set in opposition to real estate, not only goods, but whatever is accounted chattels; and the law is of opinion that our law adopts it in the negative sense.

This opinion appears to be founded on the word *chattels*; but it must be distinguished from the word *goods*, which, in our law, is used in a different operation.

By the civil law, however, *bona* is used as well personal as real; and the

(y) Co. Litt. 118. b.

(z) 2 Com. 385, 7th edit.

of all one's goods will pass a leasehold estate (*b*), because the civil law guides the construction of bequests of personalty; but it seems clear, that in an assignment, which must be construed according to the rules of the common law, a leasehold estate will not pass under the word *goods* (*I*).

It appears, therefore, that in some cases that word will include leaseholds, while in others it will not; and the true rule to discover what sense was affixed to it in the statute of frauds seems to be, an investigation of the meaning usually attached to the same word in acts of parliament passed before that statute.

By the statute of West. 2. (*c*), it is enacted, that where, upon the death of any person intestate and indebted, the *goods* (*bona*) shall come to the ordinary, he shall be bound to pay the debts so far as the *goods* (*bona*) will extend, in the like manner as executors would have been if he had left a will. And in the 31st Edw. III. (*d*), for the commitment of administration, the word *goods* (*biens*) only is used.

In both these statutes, therefore, the word *goods* was considered as denoting personalty in general. It may indeed be objected, that terms for years were not then

(*b*) Portman v. Willis, Cro. Eliz.
386.

(*c*) 13 Ed. I. c. 19.
(*d*) Stat. 1. c. 11.

(*I*) This was decided in 4 Ed. VI.; but in Portman v. Willis, *ubi sup.* Gawdy was of opinion, against Popham and Clench, that a grant of *omnia bona mobilia et immobilia*, would pass leases for years; and so, he said, would a grant of *omnia bona* in general; for 39 H. VI. 35, was, that a man had rent for years, and granted *omnia bona sua*; and it was held that this rent passed; and he vouched 4 Hen. IV. as another authority, because an executor shall have an *ejectione firmæ* by the equity of the statute of 4 Ed. III. *de bonis asportatis*.

On examination, it appears that the authorities cited by Gawdy do not apply. The grant was of *omnia bona et catalla, tam viva quam mortua*; and in the statute of 4 Edw. III. the words *biens et chateux* are used.

much in use ; but allowing this, later acts place the point still more out of doubt.

Thus the 21st Hen. VIII. c. 5, after directing how administration shall be granted in certain cases of the “ goods ” of intestates, contains a direction, that surety shall be taken of the administrators for the administration of the “ goods, chattels and debts,” which they should be authorized to minister (*e*).

In this statute, the word “ goods ” was used as synonymous to “ goods, chattels and debts ; ” and the point seems to be placed beyond controversy by the same sense being attached to that word in a statute passed but a few years previously to that upon which the present question arises.

The statute to which I allude is the 22d and 23d Car. II. c. 10, which, after giving power to commit administration of the “ goods ” of intestates, directs bonds to be taken, with a condition for (amongst other things) making an inventory of the “ goods, chattels and credits ” of the deceased ; which words are used throughout the condition. In fact, the words “ goods,” “ goods, chattels and credits,” and “ estate,” have one and the same meaning attached to them throughout the statute (*f*).

It remains to remark, that Lord Hardwicke seems to have considered leaseholds as within the operation of the 16th section of the statute of frauds, and consequently as not bound until the delivery of the writ of execution to the sheriff.

For in *Burdon v. Kennedy* (*g*), his Lordship said, where an execution by *elegit*, or *fieri facias*, is lodged in a sheriff’s hands, it binds goods from that time, except in the case of the Crown, *and a leasehold estate is also affected*

(*e*) And see 43 Eliz. c. 8.

(*f*) And see 29 Car. II. c. 3, s. 25.

(*g*) 3 Atk. 739 ; and see *Jeanes v. Wilkins*, 1 Ves. 195 ; *Forth v. Duke of Norfolk*, 4 Madd. 503.

from that time; and if the debtor, subsequent to this, makes an assignment of the leasehold estate, the judgment creditor need not bring a suit in ejectment to come at the leasehold estate, by setting aside the assignment, but may proceed at law to sell the term, and the vendee, who is generally a friend to the plaintiff, will be entitled at law to the possession, notwithstanding such assignment (I).

III. There is still another provision in the act of Charles II. in favour of purchasers. It is enacted, that the day of the month and year of enrolment of recognizances shall be set down in the margin of the roll; and that no recognizance shall bind any lands, &c. in the hands of any purchaser, *bonâ fide* and for valuable consideration, but from the time of such enrolment (*h*).

SECTION V.

Of Protection from unregistered Deeds, &c.

By several acts of parliament, all deeds and wills concerning estates within the north (*i*), east (*k*), or west (*l*) ridings of the county of York; or within the town and county of Kingston upon Hull (*m*); or within the county of Middlesex (*n*), are directed to be registered.

(*h*) 29 Cha. II. c. 3, s. 18.

(*i*) 8 Geo. II. c. 6.

(*k*) 6 Anne, c. 35.

(*l*) 2 & 3 Anne, c. 4; 5 Anne,

c. 18.

(*m*) 6 Anne, c. 35.

(*n*) 7 Anne, c. 20.

(I) Note, if the judgment-creditor tamper with the sheriff to have the estate sold at an undervalue, equity will relieve against the sale. *Gascoign v. Stut*, 3 Cha. Rep. 32. See *Dillon v. Byrn*, Irish Term. Rep. 600.

And it is enacted, that all such deeds shall be adjudged fraudulent and void against any subsequent purchaser, or mortgagee, for valuable consideration, unless a memorial thereof be registered in the manner thereby prescribed, before the registering of the memorial of the deed under which such subsequent purchaser or mortgagee shall claim.

And that all devises by will shall be adjudged fraudulent and void against subsequent purchasers or mortgagees, unless a memorial of such will be registered within the space of six months after the death of the devisor, or testatrix, dying within Great Britain ; or within the space of three years after his or her death, dying upon the sea, or in parts beyond the seas. Wills registered within the time allowed by the act will prevail over even a prior registered conveyance ; but no time is limited by the act within which a memorial of a will must be registered. It may therefore be registered at any time where there is no adverse title under a prior registered conveyance ; and there is no weight in an objection which has lately been made, that the estate descends to the heir at law, if the will be not registered within the periods above specified.

This provision is the same in all the acts, but different provisions are made by the several acts in the case of wills contested or suppressed.

If the devisee of an estate within any of the three ridings of the county of York, or the town of Kingston upon Hull, be disabled to exhibit a memorial within the time limited, by the suppression of the will, or other inevitable difficulty, then a memorial entered of such impediment within six months after the death of such devisor or testatrix, who shall die within Great Britain, or within three years after the decease of such person who shall die upon the sea, or beyond the seas ; and a memorial

of such will, also registered within six months after the removal of such impediment, will protect the devisees against any purchaser subsequently to the will.

But as to the estates in the north riding of York, it is enacted, that in case of the concealment or suppression of any will or devise, any purchaser shall not be disturbed or defeated in his purchase, unless the will be actually registered within three years after the death of the devisor.

As to estates in the county of Middlesex, it is provided, that an entry of the impediment within two years after the death of any devisor or testatrix who shall die in Great Britain, or within four years after the decease of such person who shall die upon the sea or beyond the seas; and the registry of a memorial of the will within six months after the removal of the impediment, shall be good. But no concealed will is to affect a purchaser, unless it be registered within five years after the death of the testator.

None of the acts extend to copyhold estates, or to leases at rack-rents, or not exceeding twenty-one years, where the actual possession and occupation go along with the lease. And the act for the county of Middlesex does not extend to any of the chambers in Serjeants Inn, the Inns of Court, or Inns of Chancery.

And it is by the same acts further provided, that no judgment, statute or recognizance (other than such as shall be entered into in the name and upon the proper account of the king, his heirs and successors) shall bind any such estates as aforesaid, but only from the time that a memorial thereof shall be duly entered.

This clause is general as to estates in Middlesex; but as to estates in the east and west ridings of York and Kingston upon Hull, it is enacted, that the registry of

witnesses to it; for although the memorial may be executed either by the grantor or grantee, yet one of the witnesses to it must be a witness to the *execution of the deed*, and this must be understood to mean not merely the execution by an unnecessary party, as the grantee, but the execution by the party from whom the estate moves.

It is however observed, in the Observations on Registry (*o*), that if a considerable time has elapsed from the date of a deed intended to be registered, and all the witnesses are dead, or the testimony of any of them not easily obtained, no further delay need originate from either cause, *as the re-execution of such deed by any one of the parties in the presence of a new witness*, will be sufficient to effectuate the registry.

Now there seems great reason to contend, that such a memorial would be wholly inoperative under the registering acts. A witness to the execution of a deed, which is intended to be registered, was required for the purpose of authenticating the original execution of it, and to prevent forged deeds from being put on the register (*p*). The requisition of the act is not even substantially complied with by an execution, which is totally inoperative, and which, if it had any operation, would be a fraud upon the revenue.

It seems that the direction in the act, by which the heirs, executors or administrators, guardians or trustees of some or one of the grantors or grantees, are authorized to execute the memorial, has been thought not to convey a very clear idea of the manner in which the registry by such representative is to be effected; and therefore the register requires the instrument to be registered, to be

(*o*) Rigge on Reg. p. 76, n (d);
Precedent, No. 32, p. 143.

(*p*) See *Hobhouse v. Hamilton*,
1 Scho. & Lef. 207.

effect is attempted to be given to them by force of the act.

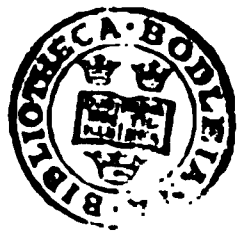
In regard to the contents of the memorial—the anxiety of the Legislature not wantonly to compel the disclosure of the concerns of individuals, induced them simply to require that every memorial should contain, first, the day of the month and year when the deed, &c. bears date, and the names and additions of all the parties to it, and of the devisor or testatrix of a will, and of all the witnesses to such deed, &c. and the places of their abode ; and secondly, the honors, manors, lands, tenements and hereditaments contained in such deed, &c. and the names of the parishes, &c. where any such estates lie that are comprised in or affected by such deed, &c. in such manner as the same are expressed or mentioned in such deed, &c. or to the same effect (z). A memorial, therefore, to the following effect would fully comply with the requisitions of the act: “ A memorial to be enrolled pursuant to act of parliament, of an indenture. It bears date the 14th day of June 1806. It is made between *A*, of &c. [here insert the description], of the one part, and *B*, of, &c. [here insert the description], of the other part. It comprises all that manor, &c. [here insert the parcels ; the general words need not be inserted, but, instead thereof, say, “ with their rights, members and appurtenances.”] And the said indenture, as to the execution thereof by the said *A* and *B*, is witnessed by *C*, of, &c. [here insert his description], and *D*, of, &c. [here insert his description]. And the said indenture is hereby required to be registered by the said *B*, as witness his hand and seal this 14th day of June 1806. Signed and sealed in the presence of *C* or *D*, [one of them must attest the memorial], and *E*, of, &c.” It seems, however, advisable to go a step farther,

(z) 7 Anne, c. 20, s. 6.

II. We are to consider what deeds ought to be registered. It is not easy to conceive that any doubt could arise on this head ; but, nevertheless, two questions have been agitated.

First, it has been contended, that a deed of appointment under a power need not be registered ; because upon the execution of a power the interest limited by it arises under the deed creating the power. But to this it was answered, that the deed was within the mischief intended to be guarded against by the act, as a purchaser could not otherwise discover whether the power was exercised ; and it was accordingly decreed, that deeds of appointment must be registered (*b*).

The other question was, whether the non-registry of a lease was cured by registering an assignment in which the lease was recited ; and it was very properly decided, that it was not (*c*) ; for the intention of the Legislature was, that the register should contain such information as might enable purchasers to ascertain whether estates were or were not subject to incumbrances ; for which purpose it is necessary, that the register should contain a regular chain of title. If one link is broken, the object of the Legislature is defeated.



III. We come to the exceptions in the acts.

The first exception is of copyhold estates. This exception is very general ; and it may be thought that no deed relating to a copyhold estate need be registered. No effectual lien can be created on the land without its appearing on the court-rolls. A lease, indeed, once created by license is a common-law interest, and may be assigned without the assignment appearing in the court-

(*b*) *Scrafton v. Quincey*, 2 Ves.
413.

(*c*) *Honeycomb v. Waldron*, 2
Str. 1064.

along with the lease. And it has been said, that where such a lease becomes assigned for a valuable consideration, its registry ought always to be recommended, and particularly when such assignment is by way of mortgage, for then it is clearly out of the exemption, the possession and occupation (mentioned conjunctively) being divided (*e*). The latter part of this observation is correct; and it is always usual in practice to require a beneficial lease, not exceeding twenty-one years, to be registered where it is assigned by way of mortgage. And, indeed, the acts seem cautiously worded, so as not to exempt the lease in that event. But it is impossible to contend, that the assignment of the lease for a valuable consideration can take it out of the exception. It still remains clearly within, as well the spirit as the words of the exception. While the possession and occupation go along with the lease no one can be deceived, and the lease still continues “a lease not exceeding twenty-one years, where the possession and occupation go along with the lease.”

The last exception requiring notice is of the chambers in Serjeants Inn, which is certainly within the city; and it therefore seems to have been doubted, whether the Legislature did not intend the act of 7 Anne to include in its operation the whole metropolis, except the borough of Southwark (*f*). But there is not the least ground for this doubt. It is not surprising that the mistake should have been made, and it is impossible to argue, that such an error shall make an act passed relating to lands “in the county of Middlesex,” upon the petition of the “justices of the peace, and grand jury of the county of Middlesex,” extend to the city of London. This construction would invalidate some thousands of leases, as the general opi-

(*e*) Rigge, 88, n. (*o*).

(*f*) Rigge, 88, n. (*p*).

protection of a court of equity; for even the rule of law is *vigilantibus non dormientibus servat lex*.

This principle extends to a mortgagor paying off mortgage-money to a mortgagee, without notice of his having transferred the mortgage, which is a valid payment, although the transfer of the mortgage is duly registered (*h*).

And it is conceived, that the rule would apply to a mortgagee lending a further sum of money to the mortgagor, without notice of the sale of the equity of redemption; and therefore a purchaser of an equity of redemption of an estate should, immediately after the sale, give notice of it to the mortgagee, although the estate is in a register county, and his conveyance is duly registered. Indeed a purchase of an equity of redemption should never be completed without the concurrence of the mortgagee, for if the mortgagee have another mortgage made to him by the seller, although of a distinct estate for a distinct debt, yet the purchaser of one estate cannot redeem one mortgage without redeeming the other (*i*).

And here it may be remarked, that an assignment should not in any case be taken of a mortgage without the privity of the mortgagor as to the sum really due; for although it undoubtedly is not necessary to give notice to the mortgagor that the mortgage has been assigned (*k*), yet the assignee takes subject to the account between the mortgagor and mortgagee, although no receipt be indorsed on the mortgage-deed for any part of the mortgage-money which has been actually paid off (*l*).

The second question is, whether a person purchasing without notice, and obtaining the legal estate, shall be

(*h*) Williams v. Sorrell, 4 Ves. jun. 389.

(*k*) See 9 Ves. jun. 410.

(*l*) Matthews v. Wallwyn, 4 Ves.

(*i*) Ireson v. Denn, 1 Cox, 425. jun. 118. See 9 Ves. jun. 264.

This decision is perfectly consonant to the general principles of equity. The intention of the act was to secure subsequent purchasers and mortgagees against *prior secret conveyances and fraudulent incumbrances*; and, therefore, where a person has notice of a prior conveyance, it is not a secret conveyance by which he can be prejudiced; for he can be in no danger where he knows of another incumbrance; because he might then have stopped his hand from proceeding, and therefore is not a person whom the statutes meant to relieve(*q*). But of course *notice* of a prior unregistered instrument is unimportant at law. The first registered instrument must prevail at law(*r*).

It will occur to the learned reader, that although the prior purchaser would, in a case of this nature, be relieved against the subsequent sale, yet the legal estate will be vested in the subsequent purchaser by force of the statute.

From the foregoing decisions, it is evident that a purchaser may be bound by a deed, although not registered; but it is equally clear, that it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situations of the persons having the prior deed; and knowing that registered, in order to defraud them of that title he knew at the time was in them(*s*). Apparent fraud, or *clear and undoubted notice*, would be a proper ground of relief; but suspicion of notice, though a strong suspicion, is not sufficient to justify the Court in breaking in upon an act of parlia-

pl. 12; *Hine v. Dodd*, 2 Atk. 275; & Lef. 521; *Eyre v. Dolphin*,
Le Neve v. Le Neve, 3 Atk. 646; 2 Ball & Beat. 290.
Sheldon v. Cox, Ambl. 624; and (*q*) *Le Neve v. Le Neve*, 3 Atk.
Jolland v. Stainbridge, 3 Ves. jun. 646.
478; and see *Cowp.* 712; 1 Burr. (*r*) *Doe v. Allsopp*, 5 Barn. &
474; 1 Schoales & Lefroy's Rep. Ald. 142.
102; *Biddulph v. St. John*, 2 Scho. (*s*) See 3 Ves. jun. 485.

ment (*t*). A *lis pendens* is not deemed notice for the purpose (*u*).

I have now brought to a conclusion the observations which I proposed to offer on the registering acts. I might be allowed to express a general opinion on the provisions in these acts, explained as they are by the decided cases, I should be tempted to observe that they might be improved. I approve rather of the act for Ireland, though not to the extent to which it has been carried by the decisions of Lord Redesdale. I would by the same means give an equitable charge the effect of a legal conveyance by the mere act of registry; at the same time that I would ensure the priority of the charge as an *equitable* charge, by making the registry of an instrument notice to all subsequent purchasers. The rule, that notice of an unregistered incumbrance shall affect the conscience of a subsequent purchaser, I would not disturb, contemplating the present temper of the Courts to confine the doctrine to cases of clear notice.

SECTION VI.

Of Protection from Acts of Papistry.

By the 11 and 12 W. III, c. 4, it was enacted, that papists who should not, within six months after attaining eighteen, take the oaths and subscribe the declaration therein mentioned, should, but as to himself or herself only, be incapable to take by descent, devise or limitation, and the estate should be enjoyed by the next of kin, being a protestant, during the life, or until the conformity of such papist. And by this act papists were rendered

(*t*) See 2 Atk. 276; and *Irons v. Burwell*, 19 Ves. jun. 435.
v. Kidwell, 1 Ves. 69, cited; *Wyat* (*u*) 19 Ves. jun. 439.

incapable of purchasing lands, either in their own names, or in the names of trustees; and all estates made to them were declared to be utterly void and of none effect, to all intents, constructions and purposes whatsoever.

To remedy the inconveniences arising from this provision, it was by a modern statute (*x*) enacted, that no sale for a full and valuable consideration by a papist, of any lands, or of any interest therein theretofore made, or thereafter to be made, to a protestant purchaser, should be impeached by reason of any disability of the vendor, or of any persons under whom he claimed, in consequence of the 11 and 12 W. III. (*y*); unless the person taking advantage of such disability should have recovered before the sale, or given notice of his claim to the purchaser, or before the contract for sale should have entered his claim at the quarter-sessions, and *bond fide* pursued his remedy. But it was expressly provided, that the clause in 11 and 12 W. III., disabling papists from purchasing, should remain in full force.

In the case of *Fairclaim v. Newland* (*z*), the Court of King's Bench expressed an extra-judicial opinion, that the statute of Geo. I. did not in every case authorize a sale by a papist to a protestant purchaser. They considered the statute of William III. as having different provisions for persons of different ages, viz. as to those under eighteen, estates limited to them were vested for the benefit of their posterity, *and these were intended to be able to convey to protestants*; but as to others above eighteen, they are absolutely disabled from taking any estate by purchase, and the statute of George never intended to enable them to convey what they had not.

In a case before Lord Hardwicke, two years afterwards, it was insisted that the proviso in the act of George

(*x*) 3 Geo. I. c. 18. See 29 Geo. III. c. 36, s. 4.

(*y*) *Vide supra*, p. 598.

(*z*) 8 Vin. Abr. 73, pl. 4.

restrained the enacting part to a statute of James recited in the act of George; and that the statute of William, the express words of the proviso, remained in full force. Lord Hardwicke, however, said "that the statute of William was to be sure made to prevent papists from acquiring new estates. Then came the statute of George I. and this statute, and the proviso in it, had a seeming repugnancy, and he would take notice, that the statute in this respect had always been doubtful; so that people had thought that the proviso restrained the statute, and it was certainly a very odd proviso. But he thought the meaning of the proviso was only *ex abundanti cautela* against papists, and was not designed to affect protestant purchasers; for if it were otherwise, the security to protestant purchasers, under the statute, would be a most doubtful security." And he considered the enacting part of the statute as in full force for the benefit of a protestant purchaser, although it was not necessary to decide on that point (a).

Mr. Wilbraham was one of the counsel for the plaintiff in the last case, and in an opinion given by him on that point a few years afterwards, he thought that the act of Geo. I. authorized a sale by a papist purchaser to a protestant purchaser, and was not in that respect controlled by the proviso. He stated, that as the opinion of eminent conveyancers, from the time of passing the statute in 1717, till about the year 1740, had been, that papist purchasers might sell; and as it was the opinion of the present Chancellor, and several eminent lawyers, that they might sell, he was of the same opinion, though the Court of King's Bench seemed to be of a contrary opinion. In a trial at bar, in the year 1741, between Fairchild and

(a) *Wildigos v. Keeble*, 8 Vin. 1 Atk. 535; 2 Ves. 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Newland (*b*). Indeed it seems surprising that any doubt should have arisen on this point, as the act was passed for the express purpose of encouraging Roman catholics to sell their estates to protestants, however they might have acquired them ; and the Legislature was only anxious that Roman catholics should not derive any power from the act to purchase *and hold* estates. A different construction would deprive the act of nearly all operation. It has now, however, long been thought the better opinion, that the proviso does not defeat the enacting part in favour of protestant purchasers, and on the authority of it many purchases of considerable consequence have been made (*c*).

The act requires the sale to be “for a full and valuable consideration ;” but the purchase will be protected by the statute, although a year’s purchase more might have been obtained for the estate, the consideration being only evidence of the reality of the purchase (*d*).

And although a purchase from a papist was made under suspicious circumstances, yet if the purchaser has paid any part of the purchase-money, he may plead the statute of William III, in bar to a bill for a discovery from him, whether the vendor was a papist ; for by his discovery the estate might perhaps be recovered at law, and then he would lose the money he had paid (*e*).

On this statute it remains to observe, that a purchaser having notice of the vendor being a papist, and under a disability to hold, is immaterial, unless it was given

(*b*) 2 Vol. Cas. and Opin. 60 ; Lef. 13, for the construction of and see several other opinions, *ib.* popery acts.
54 to 71.

(*c*) See Mr. Butler’s learned note to Co. Litt. 391, a, s. 3. See also 43 Geo. III. c. 30 ; and see O’Fallon v. Dillon, 2 Scho. &

(*d*) Wildgoose v. Moore, 1 Atk. 535 ; 2 Ves. 392, cited ; *vide supra* ; 2 Atk. 210 ; Barnard. Rep. Cha. 455 ; Smith v. Read, 1 Atk. 526.

(*e*) Harrison v. Southcote, 1 Atk. 528 ; 2 Ves. 389.

to him by the person taking advantage according to the act of Geo. 1.

I have allowed this section to a knowledge of its contents may 10 Geo. 4, c. 7, s. 23, it is enacted of that act no oath or oaths required to be taken by his Majesty the Roman catholic religion, for enjoy any real or personal property may by law be tendered to and his Majesty's other subjects.

SECTION V

Of Protection from Defect

HERE may be mentioned the Geo. II, c. 20, for which the Prolocutor Mr. Pigot; whereby, after recovery or neglect of persons employed recoveries, it has happened, and recoveries are not entered on record for a valuable consideration may rights: " It is enacted, that who hath or have purchased, or shall for consideration, any estate or estates or hereditaments, whereof a recovery were necessary to be suffered, title, such person and persons, him, her or them, *having been in possession of the estate or estates from the time of purchase, produce in evidence the title of the tenant to the writ or writs of error*

suffering a common recovery or recoveries, and declaring the uses of a recovery or recoveries; and the deed or deeds so produced (the execution thereof being duly proved) shall, in all courts of law and equity, be deemed and taken as a good and sufficient evidence for such purchaser and purchasers, and those claiming under him, her or them, that such recovery or recoveries was or were duly suffered and perfected, according to the purport of such deed or deeds, in case no record can be found of such recovery or recoveries, or the same shall appear not to be regularly entered on record: provided always, that the person or persons making such deed or deeds as aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or recoveries."

SECTION VIII.

Of Protection from Defects in Sales for Land-Tax.

WE may here notice the 12th section of the 54 Geo. III, c. 173, whereby, after reciting that for the purpose of redeeming land-tax, or of raising money for reimbursing the stock or money previously transferred or paid, as the consideration for redeeming land-tax charged on lands and other hereditaments belonging to persons for the time being seised or possessed, or entitled beneficially in possession to the rents and profits of, but not having the absolute estate or interest in, such lands or other hereditaments, or for some other purposes for which lands and hereditaments are authorized to be sold by such persons under the powers and provisions of the said act of the 42d year of

the decree of a court of equity on a bill filed, or by a summary application to a court of equity by petition, and by the usual proceedings before the Master or other proper officer of the court on such petition, and an order thereupon; and shall, under such decree or order, have an annual rent-charge to such an amount, and for and during such term or estate, and charged upon such lands or other hereditaments as such court shall order or direct; and the said court shall have full power to adjust the proportion and terms of such annual rent-charge between different claimants, and to direct the settlement of such annual rent-charge in such manner as the said court shall, under the circumstances of the case, in its discretion, think proper; and shall also have power to make such order respecting the costs of the parties as the said Court shall think fit.

By the 57th of his late Majesty, c. 100, s. 22, after reciting that it appeared that some deeds of sale, which previous to the revocation of the commissions theretofore granted under the royal sign-manual, enabling the persons therein named to be commissioners for the redemption and sale of the land-tax, were intended to have been executed by and under the authority of the persons named in such commissions, had been executed by the tenants for life, or other persons having authority, with the consent of such commissioners to make such sales, but had not been executed by such commissioners, and difficulties had in some instances arisen as to the mode of confirming titles under such imperfect conveyances, and that it was expedient that a discretionary power should be given to the commissioners for the affairs of taxes of confirming the same, and also any deed of mortgage or grant that might for the same cause be found imperfect, it was therefore enacted, that upon production to the commissioners for

comprised, or upon the respective grantees of any rent-charges, and all persons claiming by, from, through, under or in trust for them respectively, as good a title to the lands or hereditaments sold or mortgaged, or to the rent-charges granted, as if two of the commissioners for the time being, acting under the royal sign-manual, and who would have been competent under the acts for the time being to consent to such sales, mortgages or grants respectively, had approved of and consented thereto respectively, by signing and sealing such deeds respectively; and no deeds of sale, mortgage or grant, so to be confirmed, should require any stamp-duty by reason of any execution thereof by the commissioners for the affairs of taxes, or by reason of any such indorsement to be made thereon, as aforesaid.

And it was further enacted (f), That where any contract should have been entered into for the redemption of any land-tax, and any contract should have been entered into for sale of any lands or other hereditaments for the purpose of raising money to complete the contract for the redemption of such land-tax, and it should appear that such contract for sale could not, under the powers and authorities of the land-tax redemption-acts or any of them, or by reason of some defect in the title to the lands or other hereditaments comprised in such contracts for sale, be completed, it should be lawful for the commissioners for the affairs of taxes, or any two of them, to rescind and declare void such contract for redemption of land-tax, and thereupon it should be lawful for the said commissioners to make such orders, and give such directions, as they should think proper for the re-transfer of any stock, or the re-payment of any money that might have been previously transferred or paid in pursuance of such

rescinded contract ; and the governor and company of the Bank of England, the commissioners for the reduction of the national debt, and the several receivers-general in England and collectors in Scotland, to whom the same might respectively appertain, should, upon a certificate of such contract being so rescinded, make, and they are hereby respectively required to make, such re-transfer or re-payment accordingly.

And after reciting that it was expedient to make provision for the enrolment and register of deeds, which had not been duly enrolled or registered pursuant to the directions of the several acts passed relating to the redemption of the land-tax, it was enacted (*g*), that all deeds required by the said acts, or any of them to be enrolled or registered, should be valid and effectual, although the same should not have been or should not be enrolled or registered within the periods prescribed by the said acts respectively, provided the same should have been enrolled or registered before the passing of the said act, or should be enrolled or registered within twelve calendar months after the passing thereof ; and that in any case such deeds should not be enrolled or registered within twelve calendar months after the passing of the said act, or any deeds thereafter to be executed under the powers of the said acts or any of them, or of this present act, should not be enrolled or registered within six calendar months after the execution thereof respectively, it should be lawful for any two or more of the commissioners for the time being for the redemption and sale of the land-tax, if they should think fit, upon the production of any such deeds, to order the same to be enrolled or registered ; and that all deeds to be enrolled or registered pursuant to any such order should be as valid and effectual as if the same had been enrolled

or registered within the periods prescribed by the said acts or by this present act; and that all conveyances made subsequent to any deeds already enrolled or registered, or to be enrolled or registered under this act, and depending in point of title on such deeds, should be of the same effect as if such deeds had been enrolled or registered on the day of the date thereof: nevertheless, without prejudice to the validity of any assurances theretofore made or thereafter to be made to correct or supply any defects arising from the want of such enrolment or registry.

And after reciting that for the purpose of redeeming or purchasing land-tax, or of raising money for reimbursing the stock or money previously transferred or paid as the consideration for redeeming land-tax, or for purchasing assignments of land-tax, or for some other purposes for which lands and hereditaments were authorized to be sold under the powers and provisions of the acts theretofore passed, relating to the redemption and sale of the land-tax or some of them, some sales of lands and other hereditaments had been made, the title to which, as derived under such sales, might be considered void or voidable, or liable to be impeached at law or in equity, or be liable to objections calculated to impede the free alienation thereof, it was further enacted (*h*), that all sales made, and all conveyances executed, of lands or other hereditaments sold for the purpose of redeeming or purchasing land-tax, or for raising money as thereinbefore was mentioned, provided such conveyances should appear to have been executed under the authority and with the consent and approbation of the respective commissioners for the time being authorized to consent to sales made under the powers of the said acts respectively, or any of them, should be and the same were thereby ratified and confirmed from the respective periods at which such sales and

SECTION IX.

Of Protection from Crown Debts.

FORMERLY, where the seller was a debtor or accountant to the Crown, the title was not good until a *quietus* was entered up on record. And a purchaser could not be compelled to take the title, although the Crown consented to the payment of the purchase-money into the exchequer on account of the debt (*k*).

To obviate this difficulty, it was by the 10th section of an act of the 1st and 2d year of king George IV. c. 121, intituled, "An act to alter and abolish certain forms and proceedings in the exchequer and audit-office relative to public accountants, and for making further provisions for the purpose of facilitating and expediting the passing of public accounts in Great Britain, and to render perpetual and amend an act, passed in the 54th year of his late Majesty, for the effectual examination of the accounts of certain colonial revenues," enacted, that in all cases where any estate belonging to a public accountant shall be sold under any writ of extent, or any decree or order of the Courts of Chancery or Exchequer, and the purchaser or purchasers thereof or of any part thereof shall have paid his, her or their purchase-money into the receipt of his Majesty's Exchequer, an entry of such payment shall be made by the commissioners for auditing the public accounts in the declared account of such public accountant, and from and after such payment and entry as aforesaid, such purchaser or purchasers, his, her and their heirs and assigns, shall be wholly exonerated and discharged from all fur-

(*k*) *Brakespear v. Innes*, V. C. Master of the Rolls, MS.

A court of equity acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a man who has purchased for a valuable consideration *bond fide*, and without notice of any claim on the estate, such a man is entitled to the peculiar favour and protection of a court of equity.

And it has been laid down as a general rule, that a purchaser *bond fide*, and for a valuable consideration, without notice of any defect in his title *at the time he made his purchase*, may buy or get in a statute, mortgage, or any other incumbrance (and that although it is satisfied); and if he can defend himself at law by any such incumbrance, his adversary shall never be aided in a court of equity for setting aside such incumbrance; for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous, viz. where the Court hath refused to give any assistance against a purchaser, either to an heir, or to a vendor, or to the fatherless, or to creditors, or even to one purchaser against another (*l*).

And the favour and protection of a court of equity is extended to a purchaser, not only where he has a prior legal estate, but also where he has a better right to call for the legal estate than any other person (*m*).

A purchaser cannot, however, protect himself by taking a conveyance or assignment of a legal estate from a trustee in whom it was vested upon express trusts (*n*).

The Court of Chancery will not supersede a commission of bankruptcy even for fraud, where there have been pur-

(*l*) Basset v. Nosworthy, Finch, 102; Jerrard v. Saunders, 2 Ves. jun. 454. See Anon. 2 Cha. Ca. 208; Hithcox v. Sedgwick, 2 Vern. 156.

(*m*) See 2 Vern. 600; Willoughby v. Willoughby, 1 Term Rep.

763; Blake v. Sir Edward Hungerford, Prec. Cha. 158; Charlton v. Low, 3 P. Wms. 328. *Ex parte* Knott, 11 Ves. jun. 609; Shine v. Gough, 1 Ball & Beatty, 436.

(*n*) Saunders v. Dehew, 2 Vern. 271; 2 Freem. 123.

notice from a disseisor, and the disseisee is a trustee for another, although the general rule is, that a trustee is bound to convey, upon request, to his *cestui que trust*, yet if in this case the trustee refuse to convey the legal estate to the *cestui que trust*, or to suffer the latter to bring an ejectment in his (the trustee's) name, a court of equity will not compel the trustee to do so, because it would in effect be granting relief against a purchaser(*b*). This case strongly marks the favour shown to a *bonâ fide* purchaser.

Equity will relieve a *bonâ fide* purchaser without notice from ancient statutes, if there be no direct proof on either side, and will decree them to be cancelled (*c*).

And this rule extends to mortgages, and all incumbrances which have lain dormant for a long time, and no demand made in respect thereof (*d*).

So equity will relieve a purchaser for valuable consideration against a defective execution of a power, in the same manner as he will be relieved against a defective surrender of copyholds (*e*).

But if a devisee, having an estate for life, with a power to dispose of the inheritance by *will*, sell the estate in his life-time, equity cannot relieve the purchaser, although by the effect of accident he has got the legal estate in fee-simple; for, in a case like this, the testator cannot be understood to mean that the devisee should so execute the power. The intention is, that he should give by will, or not at all; and it is impossible to hold, that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power the

(*b*) *Turner v. Back*, 22 Vin. p. 21, pl. 5, where the *cestui que trust* claimed under a voluntary settlement.

(*c*) *Burgh v. Wolf*, Toth. 226; *Smith v. Rosewell*, *ibid.* 247; and see *ibid.* 224.

(*d*) See *Abdy v. Loveday*, Finch, 250; *Sibson v. Fletcher*, 1 Cha. Rep. 32.

(*e*) *Vide infra*; and see *Chapman v. Gibson*, 3 Bro. C. C. 229; *Treat. of Powers*, ch. 6.

And the same rule prevails even where the representation is made through a mistake, if the person making it might have had notice of his right (*n*) (I).

So where a person, intending to buy an estate, inquires of another whether he has any incumbrance on the estate, and states his intention to buy it, if the person of whom the inquiry is made deny the fact, equity will relieve the purchaser against the incumbrance (*o*). Again, where a purchaser of an equitable right inquires of the trustee of the legal estate whether he knows of any incumbrance, and he answers in the negative, if it turn out that he had notice of any charge, he will be answerable to the purchaser, although he plead forgetfulness in excuse (*p*).

But a person having an incumbrance upon an estate is not bound to give notice of it to any person whom he knows to be in treaty for the purchase of the estate (*q*).

If a purchaser take a defective conveyance from the vendor, equity will compel the vendor and his heirs, and all other persons claiming under him by act of law, as assignees of a bankrupt, although without notice, and even persons claiming as purchasers for valuable consideration, if with notice, to make good the conveyance (*r*).

Bedford, 13 Vin. 536; and see 3 Cha. Ca. 85. 123; Cory v. Ger-
teken, 2 Madd. 46.

(*n*) Pearson v. Morgan, 2 Bro. C. C. 388*; see also Teasdale v. Teasdale, Sel. Cha. Ca. 59; but observe the circumstances of that case.

(*o*) *Supra*, p. 9.

(*p*) Burrowes v. Lock, 10 Ves. jun. 470; *supra*, p. 5.

(*q*) Osborn v. Lea, 9 Mod. 96.

(*r*) Jaques v. Huntly, 1 Cha. Rep. 5, cited; Taylor v. Wheeler, 2 Vern. 564; Morse v. Faulkner, 1 Anstr. 11; and see 2 Ves. jun. 151; 6 Ves. jun. 745; 11 Ves. jun. 625. See p. 592, *supra*.

(I) *Sed qu.* this as a general rule, unless there be *fraud*? See Haycroft v. Creasy, 2 East, 92; Tapp v. Lee, 3 Bos. & Pull. 367; and see Holmes v. Custance, 12 Ves. jun. 279.

So a purchaser, by a defective conveyance, will be relieved against persons who did not consider the land as their original or primary security; although they may have obtained an advantage at law (*s*).

And if a man sell an estate to which he has *no title*, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser.

But it seems to have been considered that this is a personal equity attaching on the conscience of the party, and not descending with the land; and therefore, that if the vendor do not in his life-time confirm the title, and the estate descend to the heir at law, he will not be bound by his ancestor's contract (*t*). This opinion, however, seems open to much observation, and cannot, it is conceived, be relied on.

Where, however, the conveyance is not perfected with the solemnities positively required by an act of parliament, as in the case of the ship-registry acts, equity cannot relieve, as it would be against the policy of the acts, unless perhaps there were direct fraud, in which case it should seem that equity would relieve (*u*).

It has been said, that every person who takes an assignment of a *chose* in action gives personal confidence that there is no lien upon it (*x*). Upon the purchase of a *chose* in action, or of any equitable right, it is the invariable practice of the Profession to require notice of the sale to be given to the trustee. This of course binds his conscience. And notwithstanding the general rule that, with

(*s*) *Burgh v. Francis*, Finch, 28; and see *Gilb. For. Rom.* 223.

(*t*) *Morse v. Faulkner*, 1 Anstr. 11. See *Bensley v. Burdon*, 2 Sim. & Stu. 516. Now standing for judgment on appeal before the Lord Chancellor.

(*u*) *Speldt v. Lechmere*, 15 Ves. jun. 588; *ex parte Yallop*, 15 Ves. jun. 60. See *ex parte Wright*, 1 Rose, 308.

(*x*) *Per* Lord Thurlow, in *case Davies v. Austen*, 1 Ves. jun. 247.

respect to equitable rights, *qui prior est tempore potior est jure* (*y*), it seems probable that equity would prefer a subsequent purchaser who had given a proper notice to the trustee to a prior purchaser who had neglected to do so. At least there is a case (*z*) which seems, in some measure, to authorize this conclusion.

Since these observations were published this point has been elaborately discussed in several cases. Sir Thomas Plumer held that priority in time must prevail, and that mere neglect of notice was not sufficient to postpone a purchaser. In order to deprive him of his priority it was necessary that there should be such laches as in a court of equity amounted to fraud (*a*). This decision the learned Judge forgot (and the bar was not aware of it) upon the discussion in two subsequent cases (*b*), in which the same learned Judge decided that the purchaser who had alone made inquiry, and given notice, was to be preferred over the prior purchaser, although he had simply neglected to give notice. And these decisions were affirmed upon appeal by the Lord Chancellor.

It may be laid down as a general rule, that a purchaser of a *chose* in action (*c*), or of any equitable title (*d*), must always abide by the case of the person from whom he buys, and will be entitled to all the remedies of the seller (*e*). And yet as we have seen (*f*), there may be

(*y*) See *Tourville v. Naish*, 3 P. Wms. 307; and see 2 P. Wms. 495; 15 Ves. jun. 354; 2 Taunt. 415.

(*z*) *Stanhope v. Earl Verney*, Butler's n. (1) to Co. Litt. 290, b.; and see 1 Ves. 367; 9 Ves. jun. 410; but see *Frere v. Moore*, 8 Pri. 475, the facts of which do not appear to have been ascertained.

(*a*) *Cooper v. Tynman*, 3 Russ. 60.

(*b*) *Dearle v. Hall*, *Loveridge v. Cooper*, 3 Russ. 1.

(*c*) *Davies v. Austen*, *ubi sup.*; *Turton v. Benson*, 2 Vern. 764; *Priddy v. Rose*, 3 Mer. 86; *Hamil v. Stokes*, 4 Price, 161.

(*d*) *Whitfield v. Fausset*, 1 Ves. 387.

(*e*) See *ex parte Lloyd*, 17 Ves. jun. 245.

(*f*) *George v. Milbanke*, 9 Ves. jun. 190; *supra*, p. 659.

a case in which a purchaser of a *chose* in action, merely by sustaining that character, will be in a better situation than the person was of whom he bought. And it seems, that where a person purchases a specific legacy, delivered to the legatee by the executor, if there is a deficiency of assets, the creditors must follow their demand in reasonable time, or equity will not assist them, otherwise legacies would be eternally locked up, and creditors encouraged in their laches, and to call on purchasers of legacies to refund at a great length of time (*g*).

So if trustees suffer a tenant for life of a renewable leasehold to enjoy all the profits in breach of a trust reposed in them to renew out of the rents and profits, the assets of the tenant for life will be applicable in the first instance to their indemnity, and a purchaser from the tenant for life of his life-interest, will also, it seems, be answerable to the person for whose benefit the renewal ought to have been made. But, as between the trustees and the purchaser, the latter is not primarily answerable. If they permit the tenant for life to apply to his own use all the rents and profits, and abstain from performing the trust, they cannot contend that it was the purchaser's duty to withhold any part of the rents and profits, or the consideration that came in place of them (*h*).

Where a purchaser, after the conveyance, or even before the conveyance, in prospect of the articles for sale being carried into execution, has laid out money in lasting improvements, there are but few cases in which he will not be allowed for them, in case the aid of a court of equity is required to relieve against the purchase (*i*).

(*g*) *Cholmondley v. Orford*, Ch. H. T. 1758, MS.

(*h*) *Ld. Montford v. Ld. Cado-gan*, 17 Ves. jun. 485.

(*i*) *Edlin v. Battaly*, 2 Lev. 152; *Peterson v. Hickman*, 1 Cha. Rep.

3, cited; *Whalley v. Whalley*, 1 Vern. 484; *Savage v. Taylor*, For. 234; *Baugh v. Price*, 1 Wils. 320; *ex parte Hughes*, 6 Ves. jun. 617; *ex parte James*, 8 Ves. jun. 337; *Browne v. Odea*, 1 Scho. & Lef.

And even supposing the Court to be unwilling to make an allowance for repairs and improvements, yet if an account of rents and profits is to be taken, and the plaintiff will not accept the account, according to the value of the estate when the purchaser entered, but insists to have the account taken according to the present value, the Court will compel him to make an allowance for repairs and improvements (*k*).

If, however, a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction in his mind expends a sum of money in improvements, he is not entitled to avail himself of it. If a different rule should prevail, it would certainly, as Lord Clare remarked, fully justify a proposition once stated at the bar of the Court of Chancery in Ireland, that it was a common equity to improve the right owner out of the possession of his estate. However, if the sums are large, that circumstance may influence the Court in decreeing an account from the time of filing the bill only, and not from the time of taking possession (*l*).

But if the aid of a court of equity is not required, and a person can recover the estate at law, equity, unless there be fraud, cannot, it is conceived, relieve the purchaser on account of money laid out in repairs and improvements; but must dismiss a bill for that purpose with costs (*m*).

Where a person purchases with notice of an incumbrance, although he pay off some to which that in-

115; and see 9 Mod. 412; Barnard. Cha. Rep. 450; 1 Vern. 159; Shine v. Gough, 1 Ball & Beatty, 444.

(*k*) Thomlinson v. Smith, Finch, 378.

(*l*) Kenny v. Browne, 3 Ridgw. P. C. 518.

(*m*) See Needler v. Wright, Nels. Cha. Rep. 57; but see Peterson v. Hickman, 1 Cha. Rep. 3, cited. This case, probably, turned on the fraud in the wife standing by while the improvements were made, without giving notice of her claim to the tenant.

a general rule, that a purchaser with notice is in equity bound to the same extent, and in the same manner, as the person was of whom he purchased (*r*). Thus, suppose trustees for preserving contingent remainders to join in destroying them, and to convey the estate to a purchaser, if the purchaser buy for a valuable consideration, and without notice, he cannot be affected. But if he buy with notice of the trust, although for a valuable consideration, he must convey the estate to the uses of the settlement (*s*).

But we may here observe, that it is at last settled, that trustees joining in a recovery after the first tenant in tail is of age, is not a breach of trust, and therefore a purchaser may safely buy under the title acquired by the recovery (*t*).

A purchaser will be bound, even at law, by a parol agreement for a lease not within the statute of frauds, the granting of which constituted part of the consideration, although it be not mentioned in the agreement for purchase, and the rent be not fixed (*u*).

But where the consent of a person is essential to the validity of a lease agreed to be granted, and he himself purchases the inheritance, although with full notice, yet he will not be bound by the agreement.

This was decided in a recent case, where a copyholder granted a lease to Luffkin for one year, and so from year to year, if the lord would give a license. The lord of the manor purchased the reversion himself, and took a surren-

(*r*) *Winged v. Lefebury*, 1 Eq. Ca. Abr. 32, pl. 43; *Jackson's case*, Lane, 60, *Gore v. Wiglesworth*, cited, *ibid*; *Earl Brook v. Bulkeley*, 2 Ves. 498; *Taylor v. Stibbert*, 2 Ves. jun. 437; *Lord Verney v. Carding*, 1 Scho. & Lef. 345, cited; *Crofton v. Ormsby*, 2 Scho. & Lef. 583; *Dunbar*

v. Tredennick, 2 Ball & Beat. 304.

(*s*) *Mansell v. Mansell*, 2 P. Wms. 678.

(*t*) *Biscoe v. Perkins*, 1 Ves. & Bea. 485. The Lord Chancellor has since decided the same point in the same way.

(*u*) *Dean v. Cartwright*, 4 East, 29.

der in the name of a trustee. The terms of the demise were correctly stated in the abstract of the title; the agreement contained an exception of all subsisting leases (if any there were), and in a deed from the vendor to the purchaser's trustee, there was an exception in the covenant against incumbrances "of the several and respective subsisting lease or leases, or agreements for leases, under which the present tenants now hold the premises." After the purchase, the lord gave notice to his trustee, that he would not grant any license to any copyholder of his manor to demise. The trustee then gave notice to Luffkin to quit, and brought an ejectment, in which he recovered, the Court of King's Bench being of opinion that the lease did not operate as a lease for fourteen years (*x*). Then Luffkin filed a bill against the trustee and the lord for a specific performance, on the ground of the lord having notice of the lease, and of its being excepted in the contract, &c. A case was directed to the Court of Common Pleas, who held, first, that the lease was not a lease for fourteen years; and secondly, that the tenant had no remedy on the covenant in the lease for quiet enjoyment (*y*). The cause then came on upon the equity reserved, and was fully argued by Romilly for the plaintiff, and by Hollist and Bosanquet for the defendants. And Lord Eldon, after taking a day to consider, pronounced judgment shortly, that there was not equity sufficient to support the bill (*z*).

This decision demands particular attention. It seems founded on great principles of equity, although the purchaser had voluntarily placed himself in a situation in which it was his interest to refuse his consent, without which the lease could not be sustained. We cannot fail

(*x*) *Doe v. Luffkin*, 4 East, 221.

(*y*) 1 New Rep. 163.

(*z*) Ch. 15th July 1803. S. C.

11 Ves. jun. 170.

to distinguish this case from that where a man, having a partial interest in an estate, agrees to grant a lease which his interest does not enable him to grant; and then joins with the remainder-man in selling the estate to a purchaser, with full notice of the agreement. There equity rightly holds the purchaser bound by the agreement. The vendor was bound to grant the lease, or to answer in damages for non-performance of the agreement; and as the purchaser had notice of the contract, and takes an estate which enables him to perform it, it is but just that he should be compelled to do so, in order to exonerate the vendor from an action for breach of the contract. And on this ground it should seem, that if in the case of *Luffkin v. Nunn*, Luffkin could have recovered on the covenant for quiet enjoyment, the lord would have been compelled to perform the agreement. If this had not been Lord Eldon's opinion, he would not have asked the Court of Common Pleas, whether Luffkin could recover on the covenant for quiet enjoyment in case he were evicted. Lord Redesdale appears to have overlooked this distinction, when in a late case he found fault with one point in the case of *Taylor v. Stibbert*, viz. that he thought the purchaser had a right to say, that having purchased from the son as well as the father, *and the covenant not being binding on the son's estate*, he should not be bound further than as he purchased an estate which was bound, and therefore that notice, or no notice, was of no consequence to him (*a*). The doctrine, however, can only apply to cases where the purchaser ought to indemnify the seller against the agreement.

Where a purchaser buys a reversion expectant upon a particular estate, as, subject to the life-estate of *I. S.*, although it turn out that no such estate is in existence,

(*a*) See 2 Scho. & Lef. 599.

the estate not being displaced, the fine cannot bar (*f*); so, although he purchase under a decree in equity, yet, if the decree was obtained by fraud, he cannot protect himself (*g*).

But where it is a mere legal title, and a man has purchased an estate which he sees himself has a defect upon the face of the deeds, yet the fine will be a bar, and not affect him with notice, so as to make him a trustee for the person who had the right; because this would be carrying it much too far, for the defect upon the face of the deeds is often the occasion of the fine being levied. This was laid down by Lord Hardwicke (*h*). And it was resolved in Fermor's case (*i*), that if *A* purchases land of *B*, and afterwards perceiving that *B* had but defeasible title, and that *C* had a right to it, *A* (1) levies a fine with proclamations to a stranger, or takes a fine from another with proclamations, with the intent to bar the right of *C*; this fine, so levied by consent, should bind, for nothing was done in this case which was not lawful. So the accepting a release of a right is in no case an acknowledgment that a right existed. If it were an admission of right, it must always be liable to objections, because the consideration for the release is always much less than the value of the thing demanded; but in truth, the consideration given being less than the value of the thing demanded, the transaction amounts to a denial of the right, instead of an acknowledgment (*j*).

Notice, before actual payment of all the money,

(*f*) 1 Vern. 149; 2 Atk. 631; Kennedy v. Daly, 1 Scho. & Lef. 355.

(*h*) 2 Atk. 631; and see *ib.* 390.

(*i*) 3 Rep. 79, a.

(*g*) Kennedy v. Daly, 1 Scho. & Lef. 355; Giffard v. Hort, *ib.* 386.

(*j*) Underwood v. Lord Courtown, 2 Scho. & Lef. 68.

(1) *B* is by mistake inserted in the report for *A*.

costs (*r*) (I). This rule is consistent with the others ; it is not in favour of the purchaser with notice, but of the purchaser without notice. If a different rule prevailed, he might not be able to sell the estate.

It still remains to show what will be deemed sufficient notice to a purchaser ; but the importance of this subject seems to demand a separate chapter.

(*r*) *Andrew v. Wrigley*, 4 Bro. C. C. 125.

(I) In *Grounds and Rudiments of Law and Equity*, p. 275, tit. 377, Lord Talbot is erroneously stated to have held in *Lowther v. Carleton*, that where a purchaser with notice conveys to another without notice, the second sale was vicious, because of the former conveyance being with notice ; and the author of that book warmly espouses the doctrine.

claim is not sufficient to affect a purchaser with notice of a deed, of which he does not appear to have had knowledge (c).

However, no person could be advised to accept a title concerning which there were any such reports, or assertions, without having them elucidated; because what one Judge might think a flying, vague report, or a mere assertion, another might deem a good notice. For instance, in *Fry v. Porter* (d), Hale, C. B. in speaking of the point of notice in that case, (which, however, did not relate to a purchaser), said, "here are several circumstances that seem to show there might be notice, and a *public voice in the house*, or an *accidental intimation*, &c. may possibly be sufficient notice."

That the notice to the purchaser must be in the same transaction, seems to have been settled in a case (e) upon the statute of charitable uses (f), the facts of which were, that land given to charitable uses was intended to be sold by act of parliament, and when the bill was read in parliament, it was declared, that the land was chargeable with a charitable use, and an offer was made to otherwise assure the charitable use. The bill, however, did not pass, and the land was afterwards sold to one of the members of the House, who spoke in the debate on the bill; yet this notice was held not to be sufficient notice, because it was not known to the purchaser, except as a member of parliament.

It may be here proper to mention, that an action on the case for slander of the vendor's title will not lie against a person for giving notice of his claim upon an estate, either by himself or his attorney, at a public auction, or

(c) See *Jolland v. Stainbridge*, 3 Ves. jun. 478.

(d) 1 Mod. 300. See *Butcher v. Stapely*, 1 Vern. 363.

(e) See *East Greenstead's case*, Duke, 64; and the cases *infra*, as to notice to an agent. See 1 Ves. jun. 425. (f) *Supra*, p. 672.

the direction of a court of equity ; and infants are equally bound with adults (*p*).

And if a person, with notice of any claim, purchase an estate in the name of another, without his consent, yet if he afterwards assent to it, he is bound by the notice to his agent (*q*). So a man cannot elude the effect of having notice, by procuring the conveyance to be made to a third person (*r*).

But although, if a man purchase an estate which is subject to an equity only, of which he or his agent has notice, it is a fraud ; yet, if an instrument is signed by all parties, the intention cannot be interpreted, contrary to such instrument, by notice to an agent, that some of the parties had such intention (*s*).

Although the counsel, attorney or agent, be employed only in part, and not throughout the transaction, the purchaser is equally affected by the notice. This was doubted in the case of *Vane v. Lord Barnard* (*t*) ; but in the later case of *Bury v. Bury*, before Lord Hardwicke (*u*), he said, “ where an agent has been employed for a person in part, and not throughout, yet that affects the person with notice.”

The notice to the counsel, attorney or agent, must, however, be in the same transaction ; because he may very easily have forgotten it (*v*) ; and if this were not the rule

(*p*) *Toulmin v. Steere*, 3 Mer. 210. A petition for rehearing was presented, which was afterwards withdrawn under circumstances not connected with the legal points in the case.

(*q*) *Merry v. Abney*, 1 Cha. Ca. 38 ; 1 Eq. Ca. Abr. 330 ; 2 Freem. 151 ; Nels. Cha. Rep. 59 ; *Jennings v. Moore*, 2 Vern. 609 ; 1 Bro. P. C. 244.

(*r*) *Coote v. Mammon*, 5 Bro. P. C. by Tomlins, 355.

(*s*) See 1 Bro. C. C. 351.

(*t*) *Gilb. Eq. Rep.* 6. See 2 Pow. Mortg. 597, 598, 4th edit.

(*u*) Chan. 11th July 1748, MS. Appendix, No. 25.

(*v*) *Preston v. Tubbin*, 1 Vern. 286 ; *Fitzgerald v. Fauconberge*, *Fitzgib.* 297 ; 2 Eq. Ca. Abr. 682, (D.) n. (b.) ; *Warwick v. Warwick*,

of the Court, it would be of dangerous consequence, as it would be an objection against the most able counsel because of course they would be more liable than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind (*x*). The same rule of course applies to the purchaser himself. If a man purchases an estate, under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands to which an apparent title is made, independent of that deed, the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase (*y*).

2. A public act of parliament binds all mankind ; but a private act of parliament is not, of itself, notice to a purchaser (*z*). And it is conceived, that an act of parliament of a private nature, but made a public act (I), in order that it might be judicially taken notice of, instead of being specially pleaded, and to save the expense of an attested copy, would not be deemed such a public act as to be, of itself, notice to a purchaser (*a*).

3 Atk. 291 ; Worsley v. Earl of Scarborough, 3 Atk. 392 ; Steed v. Whitaker, Barnard. Cha. Rep. 220 ; Hine v. Dodd, 2 Atk. 275 ; Lowther v. Carleton, 2 Atk. 242, S. C. MS. ; Ashley v. Baillie, 2 Ves. 368. See 1 Ves. 435.

(*x*) *Per* Lord Hardwicke, 2 Atk. 242.

(*y*) Hamilton v. Royse, 2 Scho. & Lef. 327. *Per* Lord Redesdale Mountford v. Scott, 3 Madd. 34.

(*z*) See 2 Ves. 480.

(*a*) See 3 Bos. & Pull. 578.

(I) This will not happen in future, for it has been resolved that a private act shall not be made a public act ; but it may be enacted, that the act shall be printed by the king's printer, and that a printed copy of it shall be evidence.

3. *Lis pendens* is of itself notice to a purchaser (*b*), unless it be collusive, in which case it will not bind him (*c*), but it is not of itself notice for the purpose of postponing a registered deed (*d*).

A *subpœna* served, is not, however, a sufficient *lis pendens* unless a bill be filed (*e*); but when the bill is filed, the *lis pendens* begins from the service of the *subpœna*. And the question must relate to the estate, and not merely to money secured upon it (*f*); but a bill to perpetuate the testimony of witnesses and to establish a will, is a sufficient *lis pendens* (*g*).

To affect a purchaser, it has been said that there ought to be a close and continued prosecution of the *lis pendens* (*h*), and this is required by Lord Bacon's rule. In a late case (*i*), the Master of the Rolls cited the following passage from Lord Nottingham's prolegomena of equity: "The Lord Bacon, in his 12th rule, seems to direct, that if a purchase is made *pendente lite*, after some long intermission, this case shall differ from the common case. But the rule, though reasonable, is not always observed; for in *Martin v. Stiles*, 1663, the bill filed in 1640, abated by the death in 1648: a bill of revivor was filed in 1662; and the purchase was in 1651; and yet the purchaser was bound, because now, by relation of the bill of revivor, it

(*b*) See *Toth.* 45; *Yeavely v. Yeavely*, *Toth.* 227; 3 *Cha. Rep.* 25; *Digs v. Boys*, *Toth.* 254; *Culpepper v. Ashton*, 2 *Cha. Ca.* 116. 233; *Barns v. Canning*, 1 *Cha. Ca.* 300; *Sorrell v. Carpenter*, 2 *P. Wms.* 482; and see 3 *P. Wms.* 117; *Garth v. Ward*, 2 *Atk.* 174; 3 *Barnard. Rep. Cha.* 450; *Worsley v. Earl of Scarborough*, 3 *Atk.* 392; *Walker v. Smalwood*, *Ambl.* 676; 5 *Co.* 47, b.; *Hill v. Worsley*, *Hard.* 320; *Goldson v.*

Gardiner, 1 *Vern.* 459, cited; the *Bishop of Winchester v. Paine*, 11 *Ves. jun.* 194.

(*c*) 2 *Cha. Ca.* 116.

(*d*) 19 *Ves. jun.* 439.

(*e*) *Anon.* 1 *Vern.* 318.

(*f*) *Worsley v. Earl of Scarborough*, 3 *Atk.* 392.

(*g*) *Garth v. Ward*, 2 *Atk.* 174.

(*h*) *Preston v. Tubbin*, 1 *Vern.* 286.

(*i*) *Bishop of Winchester v. Paine*, 11 *Ves. jun.* 194.

was *pendente lite*: per Clarendon, Chancellor." This passage was cited as an authority, that a purchaser during the abatement of the suit is bound in like manner as if the suit was in full prosecution. But the learned Judge by whom it was quoted, treated this as a case of great difficulty, notwithstanding the authority of Lord Nottingham. Indeed, the case referred to seems to depend too much on its own circumstances and the times in which it occurred, to serve as a precedent. The Lord Keeper expressly said, that the war and infancy excused the laches. Besides, it appears that the person who came in *pendente lite* did not claim by purchase for money, but under the will of the person against whom the original bill was filed (*k*). If the point should ever call for a decision, it will probably turn on the question, whether the plaintiff was guilty of laches in reviving the suit.

Lord Redesdale appears to have held, that although a bill is dismissed, yet a party, purchasing after the dismissal, was a purchaser *pendente lite*, if an appeal was afterwards brought in the House of Lords, since it was still a question whether the bill was *rightly* dismissed, and the parties thus having notice, must take subject to all the legal and equitable consequences; but it was not necessary to decide whether such a purchase was by force of the supposed *lis pendens* made with implied notice of the adverse title (*l*).

A purchaser *pendente lite*, on filing his supplemental bill, goes into the Court *pro bono et malo*, and will be liable to all the costs in the proceedings, from the beginning to the end of the suit (*m*); and he will not be admitted to examine the justice of a former decree, but will be bound by the prior proceedings (*n*),

(*k*) *Style v. Martin*, 1 Cha. Ca. 150. (*l*) 1 Dow, 31. (*n*) *Finch v. Newnham*, 2 Vern. 216.
 (*m*) See 1 Atk. 89; and *Gaskell*

Relief being sought against a *bond fide* purchaser who bought *pendente lite*, without actual notice, is, however, considered a hard case in equity; and although the Court cannot refuse its aid against him, yet the plaintiff is by no means a favourite; and therefore if he make a slip in his proceedings, the Court will not assist him to rectify the mistake (*o*).

The mere pendency of a suit will not prevent the defendant from selling the property, the subject of the suit, but the purchase will, in no manner, affect the right of the plaintiff, except so far as it may be necessary to go against the purchaser, if he obtain a transfer of the *legal* estate (*p*). If, however, the plaintiff have only a defeasible estate, the defendant may exercise his right to put an end to it, notwithstanding the pendency of the suit.—Therefore, if a man make a voluntary settlement, and the person claiming under it file a bill against the settler, to have the trusts performed, yet the defendant may defeat the plaintiff's right by selling the estate to a purchaser during the pendency of the suit. The same observation applies to a settlement with a power of revocation. The settler, the defendant, may revoke the settlement, although a suit is depending for carrying it into execution (*q*).

4. Decrees of the courts of equity are not of themselves notice to a purchaser (*r*).

This was expressly decided in *Worsley v. The Earl of Scarborough* (*s*); in which case it appears, by a manuscript

(*o*) *Sorrell v. Carpenter*, 2 P. Wms. 482.

(*p*) *Metcalf v. Pulvertoft*, before the Vice-Chancellor, 10th August 1813. See 1 Ves. & Beam. 180; 2 Ves. & Beam. 200.

(*q*) S. C.

(*r*) See Toth. 45; *Prac. Reg. Cha.* 125; and see Sir Thomas

Harvey v. Montague, 1 Vern. 57. 122.

(*s*) 3 Atk. 392; and see *Rivers v. Steele*, *Lib. Reg.* U. 128; temp. Lord Hardwicke, referred to by Mr. Coxe. Note, owing to the generality of the reference, I could not find this case in the register's book.

chaser who was seised of a legal estate at the time of the purchase.

If a man search the register he will be deemed to have notice(*a*); but if a search is made for a particular period, the purchaser will not by the search be deemed to have notice of any instrument not registered within that period. This was decided in *Hodgson v. Dean* (*b*), where a mortgagee directed a search to be made by the deputy-register for York from 1794, and the plaintiff's claim to an equitable estate arose under a settlement of 1755, registered in that year; and it was held that the limited search excluded the presumption of a general search, and that the mortgagee was not bound by constructive notice of the registered deed.

7. Neither an act of bankruptcy (*c*), nor a commission of bankruptcy (*d*), is notice to a purchaser.

Indeed, a decision, that an act of bankruptcy is of itself notice to a purchaser, would operate as a repeal of the provision in the statute of James, in favour of purchasers from bankrupts. For, as we have already seen, a purchaser, with notice of the act of bankruptcy, cannot take advantage of the statute (*e*).

Upon the general rule in equity in favour of purchasers, and upon the ground that an act of bankruptcy is not of itself notice to a purchaser, Lord Talbot, in the case of

(*a*) *Bushell v. Bushell*, 1 Sch. & Lef. 103.

(*b*) 2 Sim. & Stu. 221, affirmed by the Lord Chancellor, July 1825, *MS.*

(*c*) *Wilker v. Bodington*, 2 Vern. 599; *Anon.* 2 Cha. Ca. 136; *Collet v. De Gols*, For. 65; and see 4 Burr. 2425; *ex parte Knott*, 11 Ves. jun. 609; but see p. 581.

(*d*) *Hithcox v. Sedgwick*, 2 Vern.

156; reversed in *Dom. Proc.* See Journals of the House of Lords, vol. xiv. p. 601; and see 7 East, 161. See also *Sowerby v. Brooks*, 4 Barn. & Ald. 523, where the Court was not aware of the reversal in *D. P.* of *Hithcox v. Sedgwick*.

(*e*) *Vide supra*, p. 663; and see now 6 Geo. 4, c. 16, s. 81. 83. 85, 86; *supra*, p. 677.

rupt of all his interest, and when the commission follows, it operates by relation from the time the act of bankruptcy was committed : unquestionably it does ; and then the person taking the second security really takes nothing ; no interest passing from the bankrupt, and therefore shall not tack. *All the cases show that this objection will not do*, for then it would have been in vain to discuss whether there is a difference between securities after an act of bankruptcy, and after a commission issued. It follows of necessity that the law [*qu. effect*] is the same in both cases, for the operation of the commission is in either case precisely the same, reducing to dust and ashes the second security."

From these observations Lord Eldon's opinion appears to be, that *Collet v. De Gols* is still a binding authority. If it should be thought difficult to reconcile the last sentence with what precedes it, that must give way to what is before so clearly expressed. Perhaps, however, Lord Eldon intended merely to say, that though the *law* is different in these cases, *yet the effect* of the commission is the same whether it issued previously to the second mortgage, or subsequently to it, but upon a prior act of bankruptcy.

A case came before Lord Erskine, in which the precise point called for a decision. His Lordship considered Lord Eldon and Lord Redesdale as having both expressed their opinion against *Collet v. De Gols*, and he accordingly overruled it, and decided that a mortgagee could not tack advances subsequent to an act of bankruptcy, although made without notice, and the mortgagee had a prior legal estate (*k*).

This decision must, it should seem, prevent a purchaser who buys without notice of an act of bankruptcy, from

(*k*) *Ex parte Herbert*, 13 Ves. jun. 183.

availing himself of a prior legal estate as a protection against the commission ; and yet it has always been considered clear, that a purchaser could not in such a case be disturbed. The cases, however, cannot be distinguished. The mortgagee was a purchaser *pro tanto*, and he, like a purchaser out and out, relied on his legal estate *prior* to the act of bankruptcy as a protection against the subsequent commission. But we have seen that it was taken from him.

The decision is open to much observation. It entirely subverts the established rule of equity, that a purchaser without notice shall not be relieved against, and an act of bankruptcy is not of itself notice. It proceeded, too, partly on an opinion attributed to Lord Eldon, but which, it should seem, he never entertained ; and it escaped observation, that, as we shall shortly see, it had been decided in the House of Lords, that a mortgagee without notice may tack advances subsequently even to a *commission* of bankruptcy. That case must of necessity overrule all others, and the case of *Collet v. De Gols* may, therefore, be still thought to be a binding authority.

But where a purchaser claimed the benefit of Sir Samuel Romilly's act (*l*), a commission issued, although afterwards superseded, or a docket struck, would, by force of the statute, have been constructive notice to him of any prior act of bankruptcy. And now by the 6 Geo. 4, c. 16, s. 83 (*m*), the issuing of a commission shall be deemed notice of a prior act of bankruptcy (provided an act of bankruptcy has been actually committed before the issuing of the commission), if the adjudication shall have been notified in the Gazette, and the person to be affected by such notice may reasonably be presumed to have seen the same.

(*l*) *Vide supra*, p. 665.

(*m*) And see s. 85, 86 ; and *supra*, p. 680.

With respect to a commission of bankruptcy, it was, in *Hithcox v. Sedgwick*, held by Lords Commissioners Trevor and Hutchins, against Lord Commissioner Rawlinson, that a *commission* of bankruptcy was notice to a purchaser; and that case is considered by the Profession as having settled that a commission of bankruptcy is of itself notice (*n*).

But it appears, that upon appeal to the House of Lords the decree against Sedgwick was reversed, and the estate ordered to be sold, and Sedgwick to be paid the 2,200*l.* (*the money advanced after the commission issued*), with interest, costs and charges as mortgagees are usually allowed; which was of course deciding that a commission of bankruptcy is not of itself notice to a purchaser, and that advances made without notice subsequently to the commission may be tacked to the prior mortgage. In the late Mr. Coxe's copy of Vernon, in Lincoln's-Inn Library, is a note to the case of *Hithcox v. Sedgwick* (which must have been written before the publication of the Lords Journals), in which he states, that Mr. I. Ord had told him the decree was reversed on appeal to the House of Lords as against Sedgwick, and that he (Ord) found it so said in a note of this case, taken by Lord Trevor, in which he says, the decree was so reversed; and that he was counsel on the appeal for Sedgwick.

8. What is sufficient to put a purchaser upon an inquiry is good notice (*o*); that is, where a man has sufficient information to lead him to a fact he shall be deemed conusant of it. Therefore, if a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice what the trust is (*p*). So notice that

(*n*) See For. 70; 9 Ves. jun. 28; 1 Pow. Mortg. 563, 4th edit.; Cooke's B. L. 628, 2d edit.; Cul-
len's B. L. 235; 2 Cruise's Dig. 250; *ex parte* Knott, 11 Ves. jun. 609.
(*o*) Smith v. Low, 1 Atk. 489; Taylor v. Baker, 1 Dan. 71.
(*p*) Anon. 2 Freem. 137, pl. 711.

stated that he had given a judgment or warrant of attorney to *A* for money borrowed of him, this was held to be notice of the mortgage (*x*).

In a late case, where a charity-lease was sought to be set aside as improvidently made, upon the common equity, and it appeared that some of the parties stood in the character of purchasers, Lord Eldon said, though the purchaser of a lease has never been considered as a purchaser for valuable consideration, *without notice*, to the extent of not being bound to know from whom the lessor derived his title, he (Lord Eldon) was not aware of any case that had gone the length that the purchaser was to take notice of all those circumstances under which the lessor derived that title. Therefore, although the parties before the Court must be understood at least to have notice that the lessors were trustees for a charity, yet he could not go the length that the purchasers had notice that the lease was bad ; that depending on a number of circumstances *dehors* the lease (*y*).

But this of course, as in all other cases of notice, only prevails in equity ; for although a purchaser has actual notice of a lease, yet if it be invalid, he may at law recover the possession from the lessee (*z*).

Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title. Therefore, if a person equitably entitled to an estate let it to a tenant who takes possession, and then the person having the legal estate sells to a person who purchases *bond fide* and without notice of the equitable claim, the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession.

(*x*) *Taylor v. Baker*, 5 Price, 306. house, 17 Ves. jun. 293. See 3 Ridg. P.C. 512.

(*y*) *Attorney-General v. Back-* (*z*) *Doc v. Luffkin*, 4 East, 221.

look into that deed, and that deed contains recitals of judgments affecting the lands he has so agreed to purchase, he is bound by those judgments, for he had a right to see the whole deed under which he purchased, and therefore must be taken to have seen the whole, and must consequently be presumed to have taken notice of every thing contained in it affecting his purchase (*d*).

So if an estate be subject to incumbrances, and be given by the owner in consideration of another estate given to him, the latter estate is subject in equity to the incumbrances charged at law on the former, and a purchaser, with notice of the transaction, is liable to the incumbrances although he had not notice of them. This was decided by Lord Redesdale, who considered it sufficient that the purchaser, by notice of the deeds, had notice of the equity although he had not notice of the particular incumbrance. This he said was an equity of which every purchaser under a settlement must have notice ; for it is a clear rule, that a man cannot claim under a deed, and avoid the deed ; he must submit to the whole ; and he has notice of every thing of which the vendor had notice, so far as concerns that deed (*e*). This, it may be observed, was an opinion not intended to decide the case, although it was acquiesced in. It carries the rule much farther, it is apprehended, than is warranted by either principle or authority.

But where a husband has not performed a marriage agreement on his part he is not entitled to claim the benefit of it (*f*), and a purchaser from him of the consideration for the settlement by the wife, with notice of the

(*d*) *Hamilton v. Royse*, 2 Scho. & Lef. 326, *per* Lord Redesdale.

(*e*) *Hamilton v. Royse*, 2 Scho. & Lef. 315.

(*f*) *Mitford v. Mitford*, 9 Ves. jun. 87. See *Bascoi v. Serra*, 14 Ves. jun. 313.

deed, will be bound by the same equity as the husband was (*g*).

But the recital in a deed of a fact, which may or may not, according to circumstances, be held in a court of equity to amount to a fraud, will not, it seems, affect a purchaser for valuable consideration denying actual notice of the fraud (*h*). Nor will circumstances amounting to *mere suspicion* of fraud be deemed notice thereof to a purchaser. This question constantly arises in practice, in sales by tenant for life, and a child to whom he has appointed the estate under an exclusive power of appointment amongst his children. If there was any understanding or agreement between the father and son, the power would be deemed fraudulently executed, and the other children might be relieved against it. The difficulty on the part of a purchaser is to ascertain what circumstances, independently of a direct statement of the fact, are sufficient to fix the purchaser with presumptive notice of fraud. Lord Eldon has greatly relieved this difficulty by deciding, that the mere circumstance of the father first contracting to sell the estate, and then appointing to one child, who joins in the sale, will not affect the purchase where the contract appears to have been fair, and the purchase-money to have been paid to all the parties, and there is nothing to show that the son was not to receive a due proportion of the money (*i*).

Although a term assigned generally in trust to attend the inheritance is equally charged with the inheritance itself, yet such a trust is not of itself notice to a purchaser of any incumbrances; for it is notice of nothing but that there is an inheritance to be protected, and that the term

(*g*) *Harvey v. Ashley*, 2 Scho. & Lef. 328, cited. P. C. 512. See 17 Ves. jun. 293.

(*i*) *M'Queen v. Farquhar*, 1

(*h*) *Kenny v. Browne*, 3 Ridge. Ves. jun. 467; *vide supra*, p. 327.

is attendant. It therefore gives notice to a purchaser of nothing but what he had notice of by the deeds making out the title to the fee.

But if in an assignment it be declared that the term is assigned to attend the inheritance, *as limited or settled by such a deed*, or to protect *the uses of such a settlement*, as is sometimes done, that will be notice of the deed or settlement, and consequently of all the uses of it, and the purchaser is bound to find them out at his peril (*k*).

It has been said that the court-rolls are the title-deeds of copyholds, and a purchaser is affected with notice of the court-rolls as far back as a search is necessary for the security of the title (*l*). But this does not accord with the general rule as to judgments, registered deeds, and the like, and would lead to great inconvenience in practice. It frequently happens that purchasers of property of small value accept the title of a great family under the last settlement, and it would be impossible to hold that they were bound by notice of the contents of the early deeds if not referred to by the settlement. A purchaser of a copyhold estate is furnished with an abstract of the surrenders and admissions, and requires copies of the material ones; but, in point of fact, the court-rolls are scarcely ever searched by a purchaser, and it has always been understood, in practice, that he is not bound by notice of their contents.

9. The better opinion seems to be, that being a witness to the execution of a deed will not of itself be notice; for a witness, in practice, is not privy to the contents of the deed (*m*).

(*k*) Willoughby v. Willoughby, 1 T. Rep. 763; 1 Col. Jurid. 337.

(*l*) Pearce v. Newlyn, 3 Madd. 186.

(*m*) Mocatta v. Murgatroyd, 1 P. Wms. 393; Editor's and Cox's

notes, *ibid.*; Welford v. Beezley, 1 Ves. 6; Beckett v. Cordley, 1 Bro. C. C. 357. See 1 Ves. jun. 55; and see Harding v. Crethorn, 1 Esp. Ca. 56; Holmes v. Custance, 12 Ves. jun. 279; Biddulph v.

opinion that no relief should be granted against a purchaser; but this case is not satisfactory, as the language attributed to the Chancellor, on the principal question in that case, is by no means consistent with the prior cases on the subject.

Under these circumstances, a purchaser cannot be advised to accept a title depending on a settlement made in pursuance of articles, but not framed according to the general rules of equity (*q*); and, certainly, a court of equity would not enforce a purchaser to take such a title, although no relief might be granted to his prejudice if he actually had purchased.

III. Having endeavoured to show what will be deemed notice, either actual or constructive, we are now to inquire what will be sufficient proof of such notice.

It seems that the counsel, attorney or agent of the purchaser, cannot be admitted to prove notice.

In *Maddox v. Maddox* (*r*), the reading of the deposition of the agent of the purchaser, who swore, in proof of notice, that the deeds were laid before counsel, who made objections about the plaintiff's title, was objected to; but Lord Hardwicke said, that though an attorney or counsel concerned for one of the parties may, if he pleases, demur to his being examined as a witness, yet, if he consents, the Court will not refuse the reading his deposition. This objection, he added, had often been made; and though some particular Judges had doubted, it was then always over-ruled. And, on investigation, it will, I believe, be found that Lord Hardwicke invariably adhered to this opinion. But it was settled before Lord Hardwicke's

(*q*) See Fearne's Posth. 315.

(*r*) 1 Ves. 62; and see *Bishop of Winchester v. Fournier*, 2 Ves. 415.

time (s), and has been the observed rule of the Courts ever since (t), that counsel and attornies ought not to be permitted to discover the secrets of their clients, though they offer themselves for that purpose, *and this is the privilege of the client*, not of the counsel or attorney (I); for it is contrary to the policy of the law to permit any person to betray a secret with which the law has intrusted him.

But a communication by mistake to a person not actually an attorney, although considered so by the person making it, is not protected (u); and an attorney may give evidence of the time of executing a deed, for a thing of such a nature cannot be called the secret of his client, it is a thing he may come to the knowledge of without his client's acquainting him, and is of that nature that an attorney concerned, or any body else, may inform the Court of (x).

So, if an attorney put his name to an instrument as a witness he makes himself thereby a public man, and no longer clothed with the character of an attorney; his signature binds him to disclose all that passed at the time respecting the execution of the instrument; but not what took place in the preparation of the deed, or at any other time, and not connected with the execution of it. Every person who claims an interest in the property, has a right

(s) Lord Say and Seal's case, 10 Mod. 41. See Lee v. Markham, Toth. 110; and Anon. Skin. 404.

(t) Lindsay v. Talbot, Bull. N. P. 284; Wilson v. Rastall, 4 Term Rep. 753; and see 2 Esp. N. P. 716; Wright v. Mayer, 6 Ves. jun. 280; Sloman v. Herne, 2 Esp.

Ca. 695; Robson v. Kemp, 5 Esp. Ca. 52; Brand v. Ackerman, *ib.* 119; Rex v. Withers, 2 Camp. 578; Parkhouse v. Lowton, 2 Swanst. 194.

(u) Fountain v. Young, 6 Esp. Ca. 113.

(x) Lord Say and Seal's case, 10 Mod. 41.

(I) This was insisted upon in the reasons in *Radcliffe v. Fursman*, in the year 1730. See printed cases, *Dom. Proc.*

to call upon the attorney, as being the attesting witness (*y*); nor does this privilege extend to communications from collateral quarters, although made to him in consequence of his character of attorney; the privilege is restricted to communications, whether oral or written, from the client to his attorney (*z*).

If notice be only proved by one witness, a positive and express denial by the answer will prevent the Court from decreeing against the answer (*a*): for in equity the general rule is, that if the answer contains a positive denial of the case stated in the bill, and it is contradicted by one witness only, there cannot be a decree against the defendant, unless the circumstances so preponderate, that greater credit, upon the testimonies of both being fairly balanced, must be given to the depositions of the witness than to the answer of the defendant; laying aside all recollection that the oath of one of the parties is that of an interested person (*b*).

But where it is not a positive denial of the same fact, but admits of a difference, that it is only a denial with respect to himself, whereas in other respects it will equally affect him, there are several cases where the Court, on one undoubted witness, would decree against the answer; for instance, a person denying only personal notice is a negative pregnant, that still there may be notice to his agent, which is a fact equally material (*c*).

And where the answer is not *ad idem*, the charge being positive, and the answer only to belief, which is not suffi-

(*y*) Robson v. Kemp. 5 Esp. Ca. 52; Doe v. Andrews, Cowp. 845.

(*z*) Spenceley v. Schulenburgh, 7 East, 357.

(*a*) Alam v. Jourdon, 1 Vern. 161; 3 Cha. Ca. 123; Kingdome v. Boakes, Prec. Cha. 19; Mortimer v. Orchard, 2 Ves. jun. 243; and

see Evans v. Bicknell, 6 Ves. jun. 174; 3 Cha. Ca. 123; Dawson v. Massey, 1 Ball & Beatty, 234; Cooke v. Clayworth, 18 Ves. 12.

(*b*) *Per* Lord Eldon, East India Company v. Donald, 9 Ves. jun. 275; 1 Smith, 213.

(*c*) See 1 Ves. 66; 3 Atk 650.

cient to contradict what is positively sworn, a single witness will be sufficient (*d*).

So where there are a great many concurring circumstances, that strengthen and support the depositions of a single witness, his evidence alone will enable the Court to decree against the answer (*e*).

If the evidence is not clear enough to enable the Court to make a satisfactory decree it will be sent to law to be tried (*f*), unless the value of the property will not admit of it (*g*).

But the same rule that would absolutely prevent a decree from being made will restrain the Court from directing an issue (*h*); for the matter is only referred to law, to know what a court of equity ought to do (*i*); and sending it to law to be tried, where the jury will certainly find it on the testimony of one witness, and then decreeing it on that verdict is the same thing as decreeing on one witness, without trying it at all (*k*).

Formerly, however, an issue used to be directed, although upon the evidence a decree could not be made (*l*), and in such cases the defendant's answer was to be read at the trial, not as evidence, for that could not be, nor was it to be admitted to be true, but to be sworn, so that the defendant might have the benefit of his oath

(*d*) See 1 Ves. 97; and see *Pilling v. Armitage*, 12 Ves. jun. 78.

(*e*) *Walton v. Hobbs*, 2 Atk. 19; *Anon.* 3 Atk. 270; *Only v. Walker*, 3 Atk. 407; *Pember v. Mathers*, 1 Bro. C. C. 52; *East I. C. v. Donald*, 9 Ves. jun. 275; 1 Smith, 213; and see 6 Ves. jun. 40; *Biddulph v. St. John*, 2 Scho. & Lef. 521.

(*f*) *Arnot v. Biscoe*, 1 Ves. 95.

(*g*) *Jolland v. Stainbridge*, 3 Ves. jun. 478.

(*h*) *Pember v. Mathers*, 1 Bro. C. C. 52.

(*i*) See 1 Bro. C. C. 53, 54; 9 Ves. jun. 284; 1 Smith's Rep. 219.

(*k*) See 1 Eq. Ca. Abr. 229, pl. 13.

(*l*) *Stadd v. Cason*, Toth. 230; *Ibbotson v. Rhodes*, 2 Vern. 554; 1 Eq. Ca. Abr. 229, pl. 13, S. C.; *Cant v. Lord Beauclerk*, 3 Atk. 408, cited; *sed vide* *Christ College v. Widdington*, 2 Vern. 283.

at law as well as in equity, if it would have any weight with the jury. But this could only be done where it was merely oath against oath (*m*); and as an issue would not now be directed in such a case, the answer of the defendant cannot, it should seem, at the present day, be directed to be read at a trial at law. But if a bill is filed for a discovery only, the answer of the defendant may of course be read on the trial (*n*).

It must be remarked, that if the notice arise by construction of equity on a deed which is in the possession of the purchaser (*o*), and he contend that it did not come into his custody till after the completion of his purchase, the proof thereof will lie on him (*p*).

In one case (*q*), however, although the only evidence of the deed being in the possession of the defendant was the discovery in his answer, and on the deed being produced the counsel offered to read the answer, to show that it had not been delivered to him till lately, and long after he had purchased the estate, Lord Hardwicke refused it, although it was argued to be very hard; because the only account of the delivery of the deed was in the answer; and by its not being permitted to be read the deed must be taken to be in his custody at the time of the purchase, ten years before it actually was.

But it seems, that the defendant had sufficient notice, besides the mere custody of the deed. His conveyance recited all the former deeds; and therefore reading the answer, to prove when the deed in question came into his custody, was perfectly unnecessary. This case, therefore, cannot be deemed subversive of the general rule.

(*m*) Only *v. Walker*, 3 Atk. 407.

(*n*) See 9 Ves. jun. 282; 1 Smith, 218.

(*o*) See 1 Ves. 392.

(*p*) See 2 Ves. 486.

(*q*) *Mertins v. Joliffe*, Ambler 311.

CHAPTER XVIII.

OF PLEADING A PURCHASE.

“**SUPPOSING** a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the Court to assert his right, the Court will not interfere on either side. This is the case where the defendant claims under a purchase for valuable consideration, without notice of the plaintiff's title, which he may plead in bar of the suit (a).”

The principle of this plea, Lord Eldon observes, is this: “I have honestly and *bonâ fide* paid for this estate, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bonâ fide* (b).”

This plea is a peremptory plea, and must be sworn by the pleader (c). It must be put in *ante litem contestatam*, because it is a plea why an answer should not be put in; and, therefore, if a defendant answers to any thing to which he may plead, he over-rules his plea (d), but he may answer any thing *in subsidium* of his plea, as he may deny notice in his answer, which he may deny also in his plea; because that is not putting any thing to issue which he

(a) Mitford on Pleading, 2d ed. p. 215; Gough v. Stedman, Finch, 208.

(b) See Wallwyn v. Lee, 9 Ves. jun. 24.

(c) Marshall v. Frank, Prec. Cha. 480.

(d) Richardson v. Mitchell, Sel. Cha. Ca. 51; Blacket v. Langlands, 1 Austr. 14.

should cover by his plea from being put in issue, but it is adding, by way of answer, that which will support his plea, and not an answer to a charge in the bill, which by the plea he would decline(*e*).

But the purchaser must protect himself by plea, for if he answer, he is bound to answer fully.

The plea must state the deeds of purchase, setting forth the dates, parties and contents briefly, *and the time of their execution*(I), for that is the peremptory matter in bar(*f*)(II).

It must aver that the vendor was seised, or pretended to be seised at the time he executed the conveyance(*g*). In *Carter v. Pritchard*(*h*) it was held, that the plea of a purchase without notice must aver the defendant's *belief* that the person from whom he purchased was seised in fee. If it be charged in the bill that the vendor was only tenant for life, or tenant in tail, and a discovery of the title be prayed, such a discovery cannot be covered, unless a seisin is sworn in the manner already mentioned, or that such fines and recoveries were levied and suffered as would bar an entail if the vendor was tenant in tail; for if

(*e*) Gilb. For. Rom. 58. See *Atk.* 630; *Head v. Egerton*, 3 P. Wms. 279; and see 17 Ves. jun.

(*f*) See Gilb. For. Rom. 58; 290.

Aston v. Aston, 3 *Atk.* 302; and 2 Ves. 107. 396; and see *Wallwyn v. Lee*, 9 Ves. jun. 24.

(*h*) Michael. Term, 12 Geo. II. 1739; 2 Vivian's MS. Rep. 90, in Lincoln's Inn Library.

(*g*) *Story v. Lord Windsor*, 2

(I) *Qu.* this, as the plaintiff might thereby be enabled to proceed against the defendant at law. See *Anon.* 2 Cha. Ca. 161. In *Day v. Arundel*, Hard. 510, it was expressly held that the time of the purchase need not be stated in the plea.

(II) It seems, that the practice formerly was, to extend the plea to the discovery even of the purchase-deeds; and in *Watkins v. Hatchet*, 1 Eq. Ca. Abr. 33, pl. 3, although the purchaser improvidently offered to produce his purchase-deeds, yet the Court would not bind him to do so.

a purchase by lease and release should be set forth, which would pass no more from the tenant in tail than it lawfully may pass, and that is only an estate for the life of the tenant in tail(I), then there is no bar against the issue (i). Where, however, a fine is pleaded, the plea must aver an *actual* seisin of a freehold in the vendor, and not that he was seised, or pretended to be seised(k).

If the conveyance pleaded be of an estate in possession, the plea must aver that the vendor was in possession at the time of the execution of the conveyance(l). And if it be of a particular estate, and not in possession, it must set out how the vendor became entitled to the reversion(m). But although a bill be brought by an heir, the plea need not, on that account, aver the purchase to be from the plaintiff's ancestor(n).

The plea must also distinctly aver that the consideration-money mentioned in the deed was *bonâ fide* and truly paid(o), independently of the recital of the purchase-deed(p); for if the money be not paid, the plea will be over-ruled(q), as the purchaser is entitled to relief against payment of it(r). The particular consideration must, it should seem, be stated(s), although this point has

(i) Gilb. For. Rom. 57.

(k) Story v. Lord Windsor, 2 Atk. 630; and see Page v. Lever, 2 Ves. jun. 450; Dobson v. Leadbeater, 13 Ves. jun. 230.

(l) Trevanian v. Mosse, 1 Vern. 246; and see 3 Ves. jun. 226; and 9 Ves. jun. 32.

(m) Hughes v. Garth, Ambl. 421.

(n) Seymour v. Nosworth, 2 Freem. 123; 3 Ch. Rep. 23; Nels. Cha. Rep. 135.

(o) More v. Mayhow, 1 Cha. Ca. 34. See 2 Atk. 241.

(p) Maitland v. Wilson, 3 Atk. 814.

(q) Hardingham v. Nichols, 3 Atk. 304.

(r) See *supra*, p. 488.

(s) Millard's case, 2 Freem. 43; and Snag's case, cited *ibid.*; and see Wagstaff v. Read, 2 Cha. Ca. 156.

(I) This is the doctrine of Littleton, with which, it seems, Gilbert agrees; but since Littleton's time it has been held that the releasee has a base fee determinable by the entry or action of the issue. See Butler's n. (1) to Co. Litt. 331, a. and the authorities there referred to.

been decided otherwise (*t*). There can, however, be no objection to state the consideration, as, if it be valuable, the plea will not be invalidated by mere inadequacy (*u*). The question is not whether the consideration is adequate, but whether it is valuable? For if it be such a consideration as will not be deemed fraudulent within the statute of 27th Elizabeth, or is not merely nominal (*x*), or the purchase is such a one as would hinder a *puisne* purchase from overturning it, it ought not to be impeached in equity.

The plea must also deny notice of the plaintiff's title or claim (*y*) previously to the execution of the deeds and payment of the purchase money (*z*); for till then the transaction is not complete; and, therefore, if the purchaser have notice previously to that time he will be bound by it (*a*). And the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that title (*b*). But a denial of notice at the time of making the purchase, and paying the purchase-money, is good; and notice *before* the purchase need not be denied, because notice before is notice at the time of the purchase, and the party will, in such case, on its being made appear that he had notice before, be liable to be convicted of perjury (*c*).

(*t*) *More v. Mayhow*, 1 Cha. Ca. 34; *Day v. Arundell*, Hard. 510.

(*u*) *Basset v. Nosworthy*, Finch, 102; *Ambl.* 767; *Mildmay v. Mildmay*, *Ambl.* 767, cited; *Bullock v. Sadlier*, *Ambl.* 764.

(*x*) See *More v. Mayhow*, 1 Cha. Ca. 34; *Wagstaffe v. Read*, 2 Cha. Ca. 156.

(*y*) *Lady Bodmin v. Vendebendy*, 1 Vern. 179; *Anon.* 2 Ventr. 361, No. 2.

(*z*) *More v. Mayhow*, 1 Cha. Ca. 34; *Story v. Lord Windsor*, 2 Atk. 630; *Attorney-General v. Gower*, 2 Eq. Ca. Abr. 685, pl. 11.

(*a*) *Vide supra*, p. 746.

(*b*) *Kelsall v. Bennett*, 1 Atk. 522; which has overruled *Bramton v. Barker*, 2 Vern. 159, cited.

(*c*) *Jones v. Thomas*, 3 P. Wms. 243.

The notice must be positively and not evasively denied (*d*), and must be denied, whether it be or be not charged by the bill (*e*). If particular instances of notice, or circumstances of fraud, are charged, the facts from which they are inferred must be denied as specially and particularly as charged (*f*).

But he need only by this plea deny notice generally (*g*), unless where facts are not specially charged in the bill as evidence of notice (*h*).

Notice must also be denied by answer, for that is matter of fraud, and cannot be covered with the plea, because the plaintiff must have an opportunity to except to its sufficiency if he think fit (*i*); but it must also be denied by the plea, because otherwise there is not a complete plea in court on which the plaintiff may take issue (*k*).

Although a purchaser omit to deny notice by answer, he will be allowed to put in the point of notice by way of answer (*l*), and the omission will not invalidate his plea, if it is denied by that (*m*). If notice is omitted to be denied by the plea, and the *plaintiff reply to it*, the defendant has then only to prove his purchase, and it is not material if the plaintiff do prove notice, as he has waved setting down the plea for argument, in which case it would

(*d*) *Cason v. Round*, Prec. Cha. 226; and see 2 Eq. Ca. Abr. 682, (D.) n. (b).

(*e*) *Aston v. Curzon*, and *Weston v. Berkely*, 3 P. Wms. 244, n. (*f*); and see the 6th resol. in *Brace v. Duke of Marlborough*, 2 P. Wms. 491.

(*f*) *Meder v. Birt*, Gilb. Eq. Rep. 185; *Radford v. Wilson*, 3 Atk. 815; and see *Jerrard v. Saunders*, 2 Ves. jun. 187; 4 Bro. C. C. 322; 6 Dew, 230.

(*g*) *Ovey v. Leighton*, 2 Sim. & Stu. 234.

(*h*) *Pennington v. Beechey*, 2 Sim. & Stu. 282.

(*i*) *Anon.* 2 Cha. Ca. 161; *Price v. Price*, 1 Vern. 185.

(*k*) *Harris v. Ingledew*, 3 P. Wms. 91; *Meadows v. Duchess of Kingston*, Mitf. on Plead. 2d edit. 216, n.

(*l*) *Anon.* 2 Cha. Ca. 161.

(*m*) *Coke v. Wilcocks*, Nosc. 73.

have been overruled (*n*). If, however, a bill is exhibited against a purchaser, and he plead his purchase, and the bill is thereupon dismissed, a new bill will lie charging notice, if the point of notice was not charged in the former bill, or examined to ; and the former proceedings cannot be pleaded in bar (*o*). But if notice is neither alleged by the bill nor proved, and the defendant by his answer deny notice, an inquiry will not be granted for the purpose of affecting him with notice (*p*).

A plea of a purchase for valuable consideration without notice, will not be allowed where the pleader might by due diligence have ascertained the real state of the title (*q*).

If a purchaser's plea of valuable consideration without notice be falsified by a verdict at law, and thereupon a decree is made against the purchaser, and he then carries an appeal to the House of Lords, it will be dismissed, and the decree affirmed without further inquiry (*r*).

The title of a purchaser for valuable consideration without notice is a shield to defend the possession of the purchaser (*s*), not a sword to attack the possession of others (*t*). It is clear that it will protect his possession from an equitable title, although even that has been sometimes questioned (*u*); whether it will avail against a legal title is perhaps doubtful.

In *Burlase v. Cooke* (*x*), Lord Nottingham held the

(*n*) *Harris v. Ingledew*, 3 P. Wms. 91 ; *Eyre v. Dolphin*, 2 Ball & Beat. 302.

(*o*) *Williams v. Williams*, 1 Cha. Ca. 252.

(*p*) *Hardy v. Reeves*, 5 Ves. jun. 426.

(*q*) *Jackson v. Rowe*, 2 Sim. & Stu. 472. See and consider the

case. It has been heard upon appeal before the Lord Chancellor.

(*r*) *Lewes v. Fielding*, Colle's P. C. 361.

(*s*) *Patterson v. Slaughter*, Amb. 292.

(*t*) See 3 Ves. jun. 225.

(*u*) See 1 Ball & Beatty, 171.

(*x*) 2 Freem. 24.

plea to be good against a legal estate ; but in the subsequent case of *Rogers v. Seale* (*y*) he is reported to have been of a different opinion, and to have decreed accordingly. But unfortunately both these cases appear to be very ill reported.

In *Parker v. Blythmore* (*z*) the Master of the Rolls thought the plea good against a legal estate.

But in *Williams v. Lambe* (*a*), upon a bill filed by a dowress against a *bonâ fide* purchaser, without notice of the marriage, Lord Thurlow overruled the plea. He said that the only question was, whether a plea of purchase without notice would lie against a bill to set out dower; that he thought where the party is pursuing a *legal title*, as dower is, the plea did not apply, it being only a bar to an *equitable* not to a *legal* claim.

In a later case (*b*), Lord Rosslyn considered it impossible that *Rogers v. Seale* could be the decision of Lord Nottingham, and decreed that the plea could stand against a legal as well as an equitable title.

Lord Rosslyn did not, however, mention the case of *Williams v. Lambe*, which is against the doctrine he laid down ; nor, indeed, did he notice the case of *Parker v. Blythmore*, which is in favour of it. It is much to be lamented that all the authorities were not considered.

To argue from principle, it seems clear that the plea is a protection against a legal as well as an equitable claim; and as the authorities in favour of that doctrine certainly preponderate, we may, perhaps, venture to assert, that it will protect against both.

(*y*) 2 Freem. 84.

(*b*) *Jerrard v. Saunders*, 2 Ves.

(*z*) 2 Eq. Ca. Abr. 79, pl. 1.

jun. 454.

(*a*) 3 Bro. C. C. 264.



A P P E N D I X.

No. I.

Notice by the Owner and his Agent, of the Agent's intention to bid (a).

SIR,

I, THE undersigned *A*, of _____ owner of the estates intended to be sold by you at _____ by public auction, on the _____ day of _____ next, do hereby give you notice, that I have appointed the undersigned *B*, of, &c. to bid on my behalf, or for my use, at the same sale. And I, the above-named *B*, do hereby give you notice, that I have accordingly agreed to bid at such sale, for the use of the said *A*.

To Mr. _____ Auctioneer.

No. II.

Notice by the Agent of his intention to bid (b).

SIR,

I, the undersigned *A*, of, &c. agent of *B*, of, &c. owner of the estates intended to be sold by you at _____ by public auction, on the _____ day of _____ next, do hereby give you notice, that I intend to bid at the same sale, on the behalf, or for the use of the above-named *B*.

To Mr. _____ Auctioneer.

No. III.

Notice by the Agent, and the Person appointed by him, of such Person's intention to bid (c).

SIR,

I, the undersigned *A*, of, &c. agent of *B*, of, &c. owner of the estates intended to be sold by you at _____ by public auction,

(a) *Vide supra*, p. 16. (b) *Vide supra*, p. 16. (c) *Vide supra*, p. 16.

on the day of next, do hereby give you notice, that I have appointed the undersigned C, of, &c. to bid at the same sale, on the behalf, or for the use of the above-named B. And I, the said C, do hereby give you notice, that I have accordingly agreed to bid at such sale, for the use of the said B.

To Mr.

Auctioneer.

No. IV.

Conditions of Sale (d).

I. That the highest bidder shall be the buyer: and if any dispute arise as to the last or best bidder, the lot in dispute shall be put up at a former bidding.

II. That no person shall advance less at any bidding than . . . *l.* (I); or retract his or her bidding (e).

III. That every purchaser shall immediately pay down a deposit in the proportion of . . . *l.* for every 100*l.* of his or her purchase-money, into the hands of the *auctioneer* (II); and sign an agreement for payment of the remainder to the proprietor, on the day of next, at at which time and place the purchases are to be completed, and the respective purchasers are then to have the actual possession of their respective lots; all outgoings to that time being cleared by the vendor.

IV. That within from the day of the sale, the vendor shall, at his own expense, prepare and deliver an abstract of his title to each purchaser, or his or her solicitor; and shall deduce a good title (III) to the lots sold.

V. That upon payment of the remainder of the purchase money at the time above mentioned, the vendor shall convey the lots to the respective purchasers: each purchaser, at his or her own expense, to prepare the conveyance to him or her; and to

(d) *Vide supra*, p. 27.

Vide supra, p. 38. This has now be-

(e) *Payne v. Cave*, 6 Term Rep. 148. come an usual condition.

(I) Or thus, "than such sum as shall be named by the auctioneer at the time."

(II) This is scarcely ever done in the country; but the deposits are paid to the agent of the vendor.

(III) Where the estate is leasehold, and the vendor cannot produce the lessor's title, this condition should go on thus: "to the lease granted of the premises; but the purchaser shall not be entitled to require, or call for the title of the lessor." *Vide supra*, p. 34.

tender or leave the same at
vendor (*f*).

for execution by the

VI. That the auction-duty of 7 *d.* in the pound shall, immediately after the sale, be paid to the auctioneer by the vendor and purchaser, in equal moieties (*g*) (I).

VII. That if any of the purchasers shall neglect or fail to comply with the above conditions, his or her deposit-money shall be actually forfeited to the vendor, who shall be at full liberty to re-sell the lot or lots bought by him or her, either by public auction or private contract; and the deficiency (if any) occasioned by such second sale, together with all expenses attending the same, shall, immediately after the same sale, be made good to the vendor by the defaulter at this present sale: and in case of the nonpayment of the same, the whole thereof shall be recoverable by the vendor, as and for liquidated damages (*h*), and it shall not be necessary to previously tender a conveyance to the purchaser.

Lastly, That if any mistake be made in the description of the premises, or any other error whatever shall appear in the particulars of the estate, such mistake or error shall not annul the sale, but a compensation, or equivalent, shall be given or taken as the case may require (*i*). Such compensation or equivalent to be settled by two referees, or their umpire; each party within ten days after the discovery of the error, and notice thereof given to the other party, to appoint one referee by writing; and in case either party shall neglect or refuse to nominate a referee within the time appointed, the referee of the other party alone may make a final decision. If two referees are appointed, they are to nominate an umpire before they enter upon business, and the decision of such referees or umpire (as the case may be), shall be final.

*Condition to be inserted where the Title-deeds cannot be
delivered up (k).*

That as the title-deeds which concern this estate relate to other estates of greater value, the vendor shall retain the same in his custody, and enter into the usual covenants (to be pre-

(*f*) *Vide supra*, p. 36.

(*i*) *Vide supra*, p. 37.

(*g*) *Vide supra*, p. 39.

(*k*) *Vide supra*, p. 31.

(*h*) *Vide supra*, p. 36.

(I) This condition should be omitted where the estate is sold by assignees of a bankrupt. *Vide supra*, p. 13, 11.

pared by his solicitor, and at his expense) for the production of them to the respective purchasers: but all attested copies which may be required of such deeds shall be had and made at the expense of the person requiring the same.

Where an Estate is intended to be sold in Lots, and the Title-deeds are to be delivered up, the following Condition may be inserted:

That as the aforesaid lots are holden under the same title, the purchaser of the greater part in value of the said estate shall have the custody of the title-deeds, upon his entering into the usual covenants for the production thereof to the purchaser or purchasers of the remaining or other lots: If the largest portion in value of the estate shall remain unsold, the seller shall be entitled to retain the deeds upon entering into such covenants as aforesaid; all such covenants to be prepared by and at the expense of the person or persons requiring the same; who may have attested copies of such deeds at his, her or their own expense.

Or this:

That the title-deeds shall be retained by the vendor, until all the estates now offered for sale shall be sold, when they shall be delivered over to the largest purchaser, upon his entering into the usual covenants for the production thereof to the other purchasers; such covenants to be prepared by and at the expense of the person or persons requiring the same. Whilst the deeds remain in the seller's hands, he shall produce them to the several purchasers when required, and every purchaser may at any time have attested copies of the deeds at his own expense.

Where the Property is considerable, it may be advisable to make a stipulation as to the expense of the attested copies, according to the value of the lots. As, for instance:

That all attested copies of the title-deeds shall be made and delivered at the expense of the person requiring the same, unless his or her purchase-money exceeds/. but does not amount to/.; in which case the vendor shall furnish the attested copies of all such deeds and writings as shall be deemed necessary, according to Professional usage, at the joint expense of him and the purchaser; and if the purchase-money exceeds/. the vendor shall furnish the same at his own expense.

No. V.

Agreements to be signed by the Vendor and Purchaser after Sales by Auction (l).

It seems advisable to have two sets of conditions, at the end of one of which may be printed an agreement for the auctioneer, or agent of the vendor, to sign; and at the end of the other may be printed an agreement for the purchaser to sign.

The Agreement to be signed by the auctioneer, or agent of the vendor, may be thus:

I do hereby acknowledge, that has been this day declared the purchaser of lot of the estates mentioned in the above-written particulars, at the sum of £.; and that he has paid into my hands £. as a deposit, and in part payment of the said purchase money; and I do hereby agree, that the vendor shall, in all respects, fulfil on his part the above-written conditions of sale. As witness my hand, this day of

Purchase money - - - - £.

Deposit money - - - -

Remainder unpaid - - £.

Witness,

The purchaser may sign the following Agreement:

I do hereby acknowledge, that I have this day purchased by public auction, lot of the estates mentioned in the above-written particulars, for the sum of £.; and have paid into the hands of the sum of £. as a deposit and in part payment of the said purchase money; and I do hereby agree to pay the remaining sum of £. unto at on or before the day of and in all other respects, on my part, to fulfil the above-written conditions of sale. As witness my hand, this day of

Purchase money - - - - £.

Deposit money - - - -

Remainder unpaid - - £.

Witness

(l) *Vide supra*, p. 16.

No. VI.

Agreement for Sale of an Estate by Private Contract (m).

Articles of agreement made and entered into this day
 of between, *A*, of, &c. for himself, his heirs, executors
 and administrators, of the one part, and *B*, of, &c. for
 himself, his heirs, executors and administrators, of the
 other part, as follow : viz.

The said *A* doth hereby agree with the said *B* to sell to him
 the messuages, &c. (*parcels*) with their appurtenances, at or for
 the price or sum of*l.*: and that he the said *A* will within
 one month from the date hereof, at his own expense, make and
 deliver unto the said *B*, or his solicitor, an abstract of the title of
 him the said *A* to the said messuages and premises; and will
 also, at his own expense, deduce a clear title thereto. And also
 that the said *A*, or his heirs, and all other necessary parties,
 shall and will, on or before the day of next, on re-
 ceiving of and from the said *B*, his executors or administrators,
 the said sum of*l.* at the costs and charges of him the said
B, his heirs, executors, administrators or assigns, execute a
 proper conveyance, for conveying and assuring the fee simple
 and inheritance of and in all the said messuages and premises,
 with their appurtenances, unto the said *B*, his heirs or assigns,
 free from all incumbrances.

And the said *B* hereby agrees with the said *A*, that he the
 said *B*, his heirs, executors, administrators or assigns, shall and
 will, on the execution of such conveyance as aforesaid, pay the
 sum of*l.* unto the said *A*, his executors or administrators.

And it is hereby further agreed by and between the said *A*
 and *B* as follows : viz.

That the conveyance shall be prepared by and at the expense
 of the said *B*, and that the same shall be settled and approved of
 on the parts of the said *A* and *B* by their respective counsel;
 and that each of them, the said *A* and *B*, shall pay the fees of
 his own counsel.

And that all rates, taxes and outgoings, payable for or in re-
 spect of the premises to the day of shall be paid and
 discharged by the said *A*, his executors or administrators.

And lastly, that if the said *A* shall not deliver an abstract of

his title to the said *B*, or his solicitor, before the expiration of one calendar month from the date hereof, or shall not deduce a good and marketable title to the said messuages and premises, before the said day of then and in either of the said cases, immediately after the expiration of the said one calendar month, or the said day of (as the case may be,) this present agreement shall be utterly void to all intents and purposes whatsoever, and the jurisdiction of equity wholly barred; it being the true intent and meaning of the parties hereto, that in the event aforesaid execution of this agreement shall not be enforced by any court of equity, notwithstanding any rule (if such there be) that time cannot be made the essence of a contract, or any other rule or maxim whatsoever (*n*). In witness, &c.

A provision may also be inserted in agreements, making time the essence of the contract, in case the purchase money is not paid at the day appointed; but clauses making agreements void if a title is not made, or the purchase money paid by a stated time, should never be inserted unless it be the express intention of the parties. Where time is not deemed material, clauses to the following effect should be inserted:

That the said *B* and his heirs shall have, receive and take the rents and profits of the said messuages and premises, from the day of next, for his and their proper use.

And that if the said conveyance shall not be executed by the necessary parties, and the said purchase money paid on or before the said day of then and in such case the said *B*, his heirs, executors or administrators, shall from the same day of pay interest for the said purchase money unto the said *A*, his executors or administrators, after the rate of *per cent per ann.*

No. VII.

Bratt v. Ellis(o), C. B. Mich. and Hil. Terms, 45 Geo. III.

John Goodwin being indebted to Ellis, the defendant, an auctioneer, deposited the title-deeds of some houses with him, as a security; and gave him a written authority to sell them by auction, at any time before Midsummer 1803. They were

(*n*) *Vide supra*, ch. 8, sect. 2.

(*o*) *Vide supra*, p. 40.

accordingly put up at Garraway's; and not fetching the sum expected, they were bought in by Goodwin. Ellis not being paid, put up the houses again in September 1804, under the usual conditions. The plaintiff was declared the highest bidder at 315 *l.*; paid a deposit of 75 *l.* and signed an agreement to complete the contract. The defendant delivered possession to the plaintiff, who expended about 10 *l.* in repairs; and the defendant sent the deeds to the plaintiff's attorney, who approved of the title, and prepared a conveyance; and the defendant undertook to procure Goodwin to attend and execute the deed. Goodwin, however, upon being applied to, refused to complete the contract, which was made without his authority. The plaintiff brought the present action to recover the deposit money and interest, and the expense of perusing the abstract, preparing the conveyance, &c.; and the damages the plaintiff had sustained by losing such a good bargain. The plaintiff gave 315 *l.* for the houses, and a surveyor, examined on his behalf, proved that they were worth 751 *l.* The defendant suffered judgment to go by default. Upon the execution of the writ of inquiry of damages, the defendant's counsel admitted, that he was liable to repay the deposit, with interest, and fair expenses incurred in investigating the title, &c. But as it appeared by the declaration that the defendant was only an auctioneer, and Goodwin was the owner, he insisted that the defendant was not answerable for the difference of value. The sheriff, in his charge to the jury (which was specially summoned), said, it was admitted on all hands, that the deposit and interest, and expenses, must be paid to the plaintiff. With respect to the demand for the loss of the bargain, he thought, that the demand was recoverable; for the defendant had admitted that he had sold the property without authority; but the amount of the damages was in their discretion. They would consider whether it would have sold for 751 *l.* If they believe the surveyor, it would be quite competent to give the whole, or what they pleased. The jury returned a verdict for 350 *l.* being upwards of 250 *l.* as damages for loss of the bargain. The Court of Common Pleas, however, granted a rule to show cause why the writ of inquiry should not be set aside, and the defendant let in to plead in the action, upon paying into Court the deposit money, and interest, and on payment by the defendant to the plaintiff of his costs occasioned thereby, together with his costs of the present application. Upon showing cause, the Court made the rule absolute; on

payment to the plaintiff of the deposit, with interest, the costs of investigating the title, and the costs of the action, *as between attorney and client.*

No. VIII.

*Jones v. Dyke and others (p). Hereford Summer Assizes,
cor. Macdonald, C. B.*

The circumstances of the case were shortly these. Some estates in Wales having been advertised for sale, the plaintiff came to town, and after some treaty with the defendants, who were the auctioneers employed, he agreed to purchase the estate in question, at 975*l.* and it was agreed that he was to pay the deposit in nine days, and to give his note for it at that date, which he accordingly did. Tuchin, one of the defendants, by the desire of his partner Dyke, gave the plaintiff a receipt for the deposit, and signed a printed particular, which together amounted to an agreement in writing.

In a few hours after this transaction, Dyke and Tuchin called on a friend of the plaintiff's to acquaint him that they had just received a letter from Wales, stating that the estates were sold for more money, and requesting the particular and receipt to be returned; and the plaintiff refusing to relinquish the agreement, and having immediately returned to Wales, they by the next post sent to him his note of hand, and a particular signed by him, both of which he instantly returned.

The 100*l.* was tendered in payment of the note, and refused: the residue of the purchase money was prepared in time, and deposited at a banker's.

The plaintiff filed a bill in equity against the owner of the estate, and his trustees for sale, who denied the authority of the defendants to sell, in consequence of which the plaintiff was advised to dismiss his bill.

The plaintiff then brought an action against the defendants, in which he proved by two witnesses that the estate purchased was worth 2,117*l.* 10*s.* so that he lost upwards of 1,140*l.* by breach of the agreement.

It appearing that the defendants had no authority to sell, the plaintiff had a verdict by consent, for 261*l.* the Judge thinking

the items of which that sum was composed reasonable, but the plaintiff did not obtain any damages for the loss of his bargain.

The sum of 261 <i>l.</i> was thus made up :		£.	s.	d.
Costs of the plaintiff's solicitor	- - - - -	47	19	4
Costs of the trustees in equity, about	- - - - -	30	-	-
Interest of 975 <i>l.</i> from April 1804 to April 1807	-	146	5	-
Journies to London and Llandilo, about 20 days,	}	21	-	-
horse-hire and travelling expenses				
Journey to London	- - - - -	15	15	-
		<hr/> £. 260 19 4 <hr/>		

No. IX.

Wyatt v. Allan (q), Reg. Lib. B. 1777, fol. 576.

The bill was filed by Wyatt, charging that he, as agent for the defendant Allan, purchased an estate by auction, but that the defendant having denied the commission, he himself was forced to complete the purchase. The purchase money was 435*l.* The defendant by his answer denied that he employed the plaintiff to purchase the estate.

The Chancellor directed an issue to try the fact, and that if the jury found that an authority was given by Allan, they should indorse on the postea to what amount such authority extended. The jury found that Allan did give an authority to the extent of 400*l.* Upon the cause coming back on the equity reserved, the defendant was ordered to pay the plaintiff the 400*l.* and the plaintiff was to assign the estate, and the defendant was to pay the costs both at law and in equity.

No. X.

Sir John Morshead and others v. Frederick (r) and others.
Ch. 20th February 1806.

Certain estates of the late Sir John Frederick were devised to trustees upon trust, by mortgage or sale thereof, to raise 34,000*l.* for the benefit of his two daughters, Lady Morshead and Miss Thistlethwayte. Part of his estate consisted of a house in the

(q) *Vide supra*, p. 41.

(r) *Vide supra*, p. 65.

occupation of Smith, Payne and Smith, the bankers. In 1751, a ground lease of this house was granted for sixty-one years, at 56*l.* a year. The representative of the lessee assigned the lease to Smith and Company, subject not only to the original ground rent of 56*l.* a year, but also to an additional rent of 210*l.* A bill was filed for carrying the trusts of Sir John Frederick's will into execution. With the approbation of all parties, the house in question was offered for sale, and represented as subject to the ground lease at 56*l.* a year. Smith and Company employed an auctioneer to enter into a treaty with the plaintiff's solicitors for the purchase of the house, and he was informed by them that it was subject to the lease at 56*l.* a year. The auctioneer valued the house as being subject to the lease, and to no other rent, charge, or incumbrance, at 6,150*l.* and verbally agreed with the plaintiff's solicitors for the purchase by Smith and Company of the house at that sum: the contract was referred to the Master, who approved of it, and by an order in the cause, Smith and Company were directed to pay the purchase money into Court, to the credit of the cause, and it was ordered that they should be let into receipt of the rents from the last quarter day. The title was approved of on behalf of the purchasers, and the money was paid into the Bank according to the order. A few months afterwards, and before the conveyance was executed, application was made to Smith and Company for payment of the rent of 210*l.* to the person entitled to it. Upon this, Smith and Company insisted upon an abatement in the purchase money, which the plaintiffs would not accede to. A motion was then made to the Court by Smith and Company, that the money paid into the Bank might be repaid to them, and the contract for the purchase of the house rescinded. In support of this motion, the auctioneer swore, that he valued the house as subject to the 56*l.* a year only, and that he was ignorant of its being subject to any other rent or outgoing. The solicitor for Smith and Company swore, that no notice was taken in the abstract of the lease, by which the 210*l.* a year was reserved. One of the bankers swore, that when the money was paid into the Bank, and when the valuation was made, he and his partners believed that the auctioneer had been made fully acquainted with all the charges, whether consisting of rents or otherwise, which in anywise affected the house; and that his not being made acquainted with the rent of 210*l.* was occasioned by some undesigned omission or mistake.

In opposition to these affidavits, the solicitor of the plaintiffs swore, that he had been in receipt of the rent of 56*l.* a year nearly thirty years, which had been paid by Smith and Company since 1797, and that he had never heard that the house was ever granted by any under lease, or was made subject to any other rent than the rent of 56*l.* until long after the sale to the bankers. And that upon inquiry he found, *that the rent of 210*l.* had been paid by the bankers themselves ever since they purchased the lease.*

The motion came on before Lord Eldon, who expressed an opinion in favour of the purchaser's right to rescind the contract, but did not decide the point. It afterwards came before Lord Erskine, who held this to be a proper case for the interference of equity, on the ground of *mistake*, and accordingly granted the motion. The circumstance of both rents being payable by the purchasers, his Lordship thought immaterial, as it appeared that they had not communicated that circumstance to their broker, and the magnitude of their concerns might easily account for the omission. It could not be imagined, that any man would willingly conceal such a fact from a broker employed by him to value any property he wished to purchase; and it was equally absurd to suppose, that if a broker, in valuing any property, was ignorant of the existence of an additional rent of 200*l.* no relief lay against such a mistake in a court of equity.

No. XI.

Ex parte Tomkins (s), L. I. Hall, 23d August 1816.

A mortgagee obtained an order for sale of the estates under a bankruptcy. The assignees, without leave of the Court, appointed several puffers to bid, and two lots were knocked down to them. Lord Eldon determined that they must be held to their bargain, although they swore that they believed there was no real bidder. And in answer to an application, that if there should prove to be a real bidder, the assignees might only be compelled to pay the price which he bid, the Lord Chancellor said, that although it was a hard case, they must pay the sum at which the lots were knocked down. The order was for a

(s) *Vide supra*, p. 66.

sale, and they were not authorized to buy the estate in; their biddings might have prevented the estate from selling to a *bonâ fide* bidder, and it was impossible for the Court to say that the estate would not have fetched more than the last real bidding, if the puffer appointed by the assignees had not afterwards bid. A majority of the creditors in such a case could not bind the rest, and if assignees choose to act, they ought to procure an indemnity from the creditors.

No. XII.

Observations on the Annuity Act (t).

To this passage a note was added in a former edition, in which it was contended that the 17 Geo. III. c. 26, commonly called the Annuity Act, extended to money considerations only, notwithstanding the case of *Crosly v. Arkwright*, 2 Term Rep. 603. The authorities relied on, were *Crespigny v. Wittenoom*, 4 Term Rep. 790; *Hutton v. Lewis*, 5 Term Rep. 639; *Ex parte Fallon*, 5 Term Rep. 283; and *Horn v. Horn*, 7 East, 529; to which might be added, *Doe v. Philips*, 1 Taunt. 356. But the point is not now of much importance. The decisions under the Annuity Act had gone far beyond the letter, and in many cases even beyond the spirit of the law: and perhaps there was not any act in the statute-book on which so many cases had been decided within any thing like the same space of time. The expense of the memorial was very considerable, and the effect of the decisions, by increasing the risk of the transaction, drove fair purchasers out of the market, and lowered the price of life annuities; first, because the number of buyers was small; and secondly, because the purchasers required to be paid not only the common rate of annuity interest, but also the value of the risk of the transaction being void under the act. The Annuity Act, after having been thirty-five years in operation, was repealed by the 53 Geo. III. c. 141, except as to annuities granted before the passing of the repealing statute; and other provisions were substituted in lieu thereof.

The first section repeals the old act.

The second section requires, that within thirty (in the old act it was *twenty*) days after the execution of every deed, bond,

(t) *Vide supra*, p. 258.

FORM OF ENROLMENT.

Date of Instrument.	Nature of Instrument.	Names of Parties.	Names of Witnesses.	Name or Names of Person or Person by whom Annuity or Rent Charge to be beneficially received.	Person or Persons for whose Life or Lives the Annuity or Rent Charge is granted.	Consideration, and how paid.	Amount of Annuity or Rent Charge.
10 Aug. 1889.	Indentures of Lease and Release.	A. B. of one Part. C. D. of the other Part.	E. F. of - G. H. of -	C. D. - - -	A. B. - - -	£. 100. paid in Money. £. 500. paid in Notes of the Governor and Company of the Bank of England, or other Notes or Bills of Exchange, as the case may be.	£. 100. a year.
Same Date.	Bond in Penalty of £. 1,000.	A. B. to C. D.	E. F. - G. H. -	For securing the same Annuity or Rent Charge.			
Same Date.	Warrant of Attorney to confess Judgment on the same Bond.	A. B. to I. K. and L. M. Attornies of Court of King's Bench.	E. F. - G. H. -				

The great object of this provision was to give publicity to the transaction, and at the same time to avoid unnecessary expense to the grantor; and by the simplicity of the memorial to avoid if possible future litigation. As the act passed the House of Commons, the memorial was required to contain only four things, viz. 1. the date of the grant; 2. the name of the grantor; 3. the name of the person by whom the annuity was to be beneficially received; and 4. the amount of the annuity. The statement of the consideration was omitted, lest it should open a door to the mischiefs which the act was intended to guard against. The schedule stands as it was amended in the House of Lords. The nature of the instrument is required to be stated, to which there can be no particular objection, although it is not mentioned in the body of the act. The next amendment substitutes the names of the parties for the name of the grantor. This seems open to objection, for in many cases it may not appear who is the grantor: for example, if Richard is possessed of a lease in trust for Edward, and Edward sells an annuity to Frederick, the deed would, in the ordinary course, be made between Richard of the first part, Edward of the second part, and Frederick of the third part, and thus the memorial would stand; from which it would be inferred that Richard and not Edward was the grantor. The provision in the act, as it passed the House of Commons, was not open to this objection. The third column requires the *names* of the parties simply to be stated, and does not seem to require their additions to be inserted, but in the next column where the *names* of the witnesses are required, a blank is left in the example, manifestly for the addition of "E. F. of _____." In complying with both these requisitions, the additions of the persons should be inserted, and this is expressly required in the latter instance. This fourth column was an amendment in the Lords. In the late case of *Darwin v. Lincoln*, 5 Barn. & Ald. 444, it was held that a witness described in the memorial as the clerk of the attorney was not well described, because his place of abode was not stated. This led to the passing of another Act of Parliament which will presently be noticed.

The memorial must contain the Christian name of the subscribing witness to the securities. The initial of the Christian name is not sufficient. *Cheek v. Jeffries*, 2 Barn. & Cress. 1, and this has been followed in a late decision upon an annuity granted by Lord Strathmore. It would be prudent to state

which of the several executions the witnesses attested. It is sufficient to state, that the annuity was granted for the lives of *A. B. &c.* without stating more than their names, or adding that the annuity was granted for their joint lives, or the life of the survivor, or for a term of years determinable on those lives. *Barber v. Gamson*, 4 Barn. & Ald. 281. Another amendment requires the statement of the consideration *and how paid*. The latter words it was at first thought might be understood, *in what manner*, which would lead to all the inconveniences intended to be remedied, but it now seems agreed, that the words are not open to that construction: the meaning is, that the amount of the consideration shall be stated, and whether paid in money, notes, bills, &c. This is clear from the explanation in the act; it need not therefore be stated by or to whom the money was paid, and there is now no exception to the rule that a payment by an agent is a payment by the principal. It is observable that the amendment requires the *pecuniary* consideration or considerations to be stated. Perhaps it escaped observation, that the act extends as well to annuities granted for money's worth, as for money; but as the act stands, it is clear that none but money considerations need be stated in the memorial. It has been decided in *James v. James*, 2 Brod. & Bing. 702, (and see *Blake v. Attersoll*, 2 Barn. & Cress. 875; *Tetley v. Tetley*, 4 Bing. 214,) that an annuity granted in consideration of a conveyance of a life interest in land does not require enrolment. The Court said that the words in the tenth section, declaring that the act shall not extend "to any voluntary annuity granted without regard to pecuniary consideration or money's worth," import that money's worth may, in certain cases, be "a pecuniary consideration" within the meaning of the act; as where the grantee pays for the annuity in part, or in whole, by goods or merchandize, with a nominal or perhaps real value imposed upon them, to be converted into money by the grantor, and where the object of the grantor was to raise money, and such appears to be the real nature of the transaction, however it may be disguised. But considering the second and tenth sections together, and the intent of the Legislature as it is to be collected therefrom, the Court was of opinion that the act does not extend to cases of fair and *bonâ fide* sale of landed property, whether freehold for life or leasehold for term of years, where the consideration in part or in whole may be an annuity to be paid to the vendor. In such cases, the consideration for granting the annuity, being

of a child, nor to any annuity or rent charge secured upon *freeholds or copyhold or customary lands, in Great Britain or Ireland, or in any of His Majesty's possessions beyond the seas*, of equal or greater annual value than the said annuity, *over and above any other annuity, and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant*, whereof the grantor is seised in fee simple or fee tail in possession, *or the fee simple whereof in possession, the grantor is enabled to charge at the time of the grant*, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent charge, granted without regard to pecuniary consideration *or money's worth*; nor to any annuity or rent charge granted by any body corporate, or under any authority or trust created by act of parliament.

This is copied from the old act, with the additions in italics; the additions require no explanation, and, I believe, meet all the questions which arose on the provision in the repealed act. The provision in the old act, which excepted out of its provisions annuities not exceeding 10*l.* was not inserted in the new one. The practice with professed money lenders was to split the consideration into several parts, and make the man wanting the money grant 10*l.* annuities to different persons, to the amount agreed upon. By this plan they increased the expenses of the grantor to a considerable amount, and at the same time avoided giving publicity to the transaction.

In considering the operation of the new act, it will be necessary for the reader to keep in view the circumstance, that it extends to annuities, although not exceeding 10*l.* and also embraces annuities granted for money's worth. As to the latter, see *James v. James*, before cited.

In consequence of the decision before referred to in *Darwin v. Lincoln*, the act of the 3 Geo. IV. c. 92, was passed. By that act, after reciting the second section of the act of the 53d of the late King, and that the form or effect to which such enactment refers is expressed in several columns, at the head of one of which are the words "Names of witnesses," and underneath, as applicable to indentures of lease and release, the letters and words, "*E. F.* of " "*G. H.* of ," and as applicable to a bond and warrant of attorney to confess judgment, the letters "*E. F.*" "*G. H.*" without the word "of;" and reciting, that the words of enactment referring to such form express only that a

memorial of the names of all the witnesses to every such deed, bond, instrument or other assurance as therein mentioned, should be enrolled as directed by the said Act, without providing that any description of the witnesses should be given in such memorial, except as such form is thereby referred to; and such form does not provide that any description should be added to such names except by the addition of the word "of" to the letters "*E. F.*" and "*G. H.*" as aforesaid, as applicable to indentures of lease and release; and reciting, that in consequence of such indistinct enactment it might be doubtful whether it was the intention of the Legislature to require any, or if any, what description, to be added to the names of witnesses in the memorial of any deed, instrument or assurance, to be enrolled as aforesaid; and reciting that a very great number of memorials of grants of annuities had since the passing of the said act been enrolled, in which the names of the witnesses to the deeds, instruments or assurances specified in such memorials, had been inserted without the addition of the place of abode of such witnesses, and it has been inferred from the use of the word "of" after such letters "*E. F.*" and after such letters "*G. H.*" as aforesaid, that it was necessary to describe each of such witnesses in such memorial as of some place, and in consequence thereof some grants of annuities made since the passing of the said act had been, in proceedings in summary applications to courts of justice which could not be reviewed in any superior court, deemed null and void, on the ground that no description of the place of abode of the witnesses to some or one of the deeds, instruments or assurances by which such grants of annuities had been made, had been inserted in the memorials or memorial thereof enrolled as directed by the said act; and also reciting, that doubts had been entertained whether the construction so put on the said act is the true construction thereof, more especially as the same is so far penal as renders deeds, instruments and assurances, of which memorials had not been enrolled in pursuance of the said act, null and void; and the provisions in the said act are not so clear and explicit as the same ought to have been under such circumstances, and the parties claiming under grants of annuities might have been thereby misled and induced to conceive that it was not necessary, under the provisions of the said act, to insert in the memorial of any deed, instrument or assurance, to be enrolled as aforesaid, the place or places of abode of the witness or witnesses to such deed, instrument or assurance, or any more than the name or names of such witness or witnesses, there

being no words in the said act expressly requiring any more to be so inserted, nor any words from which it could be inferred that any more was required to be inserted, except the word " of " after the letters " *E. F.*" and " *G. H.*" respectively, with reference to one species of assurance, inserted in the form of memorial before mentioned, and that it was expedient to remove all doubts touching the construction of the said act with respect to so much of the memorials required by the said act to be enrolled as relates to any description of the witness or witnesses to any deed, instrument or assurance; it is enacted, that by the said act of the 53d year of the reign of his said late Majesty no further or other description of the subscribing witness or witnesses to any deed, bond, instrument or other assurance, whereby any annuity or rent-charge is or may be granted, is required in the memorial thereof, besides the names of all such witnesses; and so the said act shall be deemed, construed and taken. See *St. John v. Champneys*, 1 Bingham, 77. And by the same act (*a*), after reciting that doubts had also arisen whether under the said act of the 53d year of the reign of his said late Majesty the omission to enrol a memorial of any of the assurances for securing any annuity or rent charge did not vitiate the whole transaction, notwithstanding the enrolment of a memorial of another deed, bond, instrument or other assurance granting the same (*l*); and that it was also expedient to remove such doubts, it was enacted and declared that every deed, bond, instrument or other assurance granting any annuity or rent charge, and of which a memorial shall have been or shall be duly enrolled pursuant to the said act, notwithstanding the omission to enrol any other deed, bond, instrument or assurance for securing such annuity or rent-charge, shall be valid and effectual according to the intent, meaning and true effect thereof, notwithstanding a memorial of any other deed, bond, instrument or assurance for securing the same annuity, shall not have been duly enrolled pursuant to the said act.

And by the same act it is provided (*b*) and enacted, That nothing in the said act contained shall extend to give any other force or validity to any deed, bond, instrument or other assurance of which a memorial shall have been duly enrolled as aforesaid, than such deed, bond, instrument or other assurance would have

(*a*) Sect. 2.

(*b*) Sect. 3.

(I) This is singular; for the former act expressly authorizes every security to be cancelled.

had if any deed, bond, instrument or other assurance for securing the same annuity, of which a memorial shall not have been duly enrolled, had never been executed.

And by the said act it is also provided (c) and further enacted, that the said act shall not extend or be construed to extend to revive or give effect to any deed, bond, instrument or other assurance, whereby any annuity or rent-charge hath been already granted, so far as the same hath been adjudged, declared, treated or deemed void by any judgment, decree, action, suit or proceeding at law or in equity, or by any act or deeds of the parties thereto, or by any other legal or equitable means whatsoever ; nor shall the said act affect or prejudice any suit or proceeding at law or in equity commenced on or before the 31st day of May 1822, and now depending, upon the ground of an alleged defect in the memorial thereof in not describing the witnesses thereto otherwise than by his her or their name or names, for avoiding any such deed, bond, instrument or other assurance.

No. XIII.

Coussmaker v. Sewell (d), Ch. 4th May 1791.

In this cause it was referred to Master Greaves to see if a good title could be made to the estate in question. An abstract was delivered. It appeared by it, that William Perkins, an ancestor of the vendor, had made a settlement of his estate in the year 1705 ; but neither the settlement itself, nor any copy or abstract of it, could be produced, and the contents of it were totally unknown. In 1751 a fine was levied by Mr. Perkins and his eldest son ; and in 1763 a recovery was suffered, in which Mr. Perkins and his second son (the eldest son being then dead) joined in making a tenant to the *præcipe*, and the second son was vouched. The estate was mortgaged in 1759, and the title was then approved of by Mr. Serjeant Hill ; and from the wording of his opinion, it was collected, that the settlement of 1705 was then before him. Supposing the limitations in the settlement of 1705 to have been to the sons of that marriage successively in tail male, those estates-tail, and the remainders expectant upon them (if any) were completely barred by the fine and recovery.

(c) Sect. 4.

(d) *Vide supra*, p. 329.

tion of redemption, it should be lawful for the said defendant, Edward Day, to sell the said leasehold premises for the best price that could be reasonably gotten for the same ; and to reimburse himself the costs, charges and expenses relating to such sale ; and afterwards to re-purchase the said 2,000 l. 3 per cent. consolidated Bank annuities, or such part thereof as should remain due or untransferred ; and the overplus of the monies to arise by the said sale, if any, to pay to the said Thomas Wardell, his executors, administrators or assigns. And the said Thomas Wardell did, by the said indenture, covenant, that in case of any sale pursuant to the power aforesaid, he the said Thomas Wardell, his executors or administrators, would join and concur therein, and execute any assignment to the purchaser or purchasers of the said premises, with the usual covenants for the title thereto ; or do any reasonable act confirming such sale. But that, nevertheless, it should not be necessary that the joining of the said Thomas Wardell in any such sale or conveyance, should be essential to perfect the title, the same being intended only for satisfaction of such purchaser or purchasers.

Default was made in transferring the stock, and Day, who was a trustee, by Sharpe's directions, put up the premises for sale by public auction, at which sale the plaintiff became the purchaser.

The plaintiff's attorney prepared a draft of the assignment, in which he made Day the mortgagee, Sharpe the *cestui que trust*, and Wardell the mortgagor, parties ; but Wardell the mortgagor having refused to execute the assignment, the plaintiff filed his bill against Day, Sharpe and Wardell, for a specific performance of the contract for sale.

To this bill the defendants put in their answers, and Wardell stated that he resisted the sale, as having been made without his consent, and at an undervalue ; but before any proceedings were had, Wardell became a bankrupt, and in consequence thereof a supplemental bill was filed against his assignees.

The cause coming on to be heard the 15th of November 1802, the Chancellor decreed that the plaintiff's bills should be dismissed as against the defendants, Thomas Wardell, and his assignees, *with costs*, to be taxed by the Master. And it was also decreed, that the agreement entered into by the plaintiff with the defendants William Sharpe and Edward Day, for the purchase of the premises in question, should be carried into execution. And that upon the plaintiff paying unto the said de-

case as the other; and that, in the present case, thirteen years had passed between the death of the husband and the bill filed for a redemption. This was on a supposition she could prove her infancy at the time of her marriage; for if she was then of full age, my Lord Chancellor said, the time would attach and run out against her, notwithstanding the subsequent marriage, and then she would be put off from all possibility of relief, for there would be near forty years possession against her unaccounted for. By statute 21 Jac. I. c. 16, persons having any right or title of entry must enter within twenty years after titles accrued; but the title of infants, *femes covert*, &c. are saved, so as they commence their suits within ten years after the imperfection removed.

This cause coming on again the same term, was ended by consent of the parties: but Lord Chancellor Talbot spoke, however, in this case, to this effect: A peaceable and quiet possession for a long time weighs greatly with me in all cases. The foundation which the Court goes on in cases of the like nature with the present, is not any presumption, that after a long space of time the party has deserted his right; but to quiet and secure mens possession, which is very reasonable to be done after twenty years time, without some very particular circumstances: and for this cause a court of equity has generally acted in conformity to the statute of limitations. Whether the present plaintiff was an infant at the time of her marriage is to me very doubtful; but taking it she was then an infant, as the Court has not in general thought proper to exceed twenty years, where there was no disability, in imitation of the first clauses of the statute, so if I had been forced to have made a decree in the present case, I should have been of opinion, that after the disability removed, the time fixed for prosecuting in the proviso, which is ten years, should also have been observed: for the proviso containing an exception of several cases out of the purview of the statute, if the parties at law would avail themselves by the proviso, they must take it under such restrictions as the Legislature hath annexed to it, and that is, to sue within ten years after the impediment ceases. Why should not the same rule govern in equity? I think there is great reason that it should. The persons who are the subject of the proviso are not disabled from suing, they are only excused from the necessity of doing it during the continuance of a legal impediment; therefore when that difficulty is removed, and nobody can say

how long it may last, the time allowed after such impediment removed for their further proceedings should be shortened. If they would excuse a neglect under the first part of the proviso, should they not do it upon the terms such excuse is given? If I had given my opinion on this case I should have dismissed the bill.

No. XVI.

The King against John Smith, Esq. (a), Serjeants Inn Hall, March 2, 1804.—The judgment of the Court, as delivered by the Lord Chief Baron.

This case of the King against Smith has occupied a great deal of the attention of the Court, and that in a great degree owing to the prodigiously extensive consequences that it may have according as it is decided in the one way or the other. We were therefore anxious to search in order to find out what materials existed on the subject. After all the pains we could take, we find them to be but few. We have found no decision or authority similar in its terms to the present case; and the consequence of that is, where we can find principles laid down, we must be governed by them in the absence of every direct precedent on the subject. The magnitude of the question is very considerable, because, on the one hand, from some instances of persons in the service of government, and who have been intrusted with the public money, I have experience enough to say, that the ingenuity exercised by them may be such as not to make it very difficult to avail themselves of their situation, and to render it no easy matter to make them responsible; on the other hand, it puts those who make purchases from persons in such a situation in a very unpleasant and precarious situation, if the lands or goods so purchased may be extended. In this view the question is of very great importance. The stake in the present instance is next to nothing; but the decision will be such as will govern multitudes of cases that exist, and I believe many to exist of the same sort.

This case arises on an extent that was issued against John Montresor, Esq. late engineer in the service of government, in North America, who owed vast sums to government. It was found that a great balance remained in his hands which he had not accounted for. The extent issued to the sheriff of Kent—that you diligently inquire what lands and tenements, and of

(a) *Fide supra*, p. 449, 449. n. 451. 453.

what yearly value, the said John Montresor had in your bailiwick on the 28th of September, in the eighteenth year of our reign, when the said John Montresor first became indebted to us in the said money, or at any time after ; in the common language.

An inquisition is returned of course, and in the inquisition it is stated that the sheriff seized, &c.

Without going minutely into all the circumstances of this case, I believe I can state from memory, the leading facts upon which the question depends. The property now in question, which consists of a small messuage, and of some closes of land, originally belonged to a Mr. Thompson. He being seised of this property demised it for the full term of five hundred years : the residue of this term was afterwards assigned to Ann Carter ; and last of all to John Smith, the present defendant, in trust. And in 1795, Mr. Smith purchased the reversion of General Montresor, he being then seised of this property in his demesne as of fee subject to this term of five hundred years ; and at the time of the purchase Mr. Smith had no notice of any debt that had been incurred by John Montresor to the King.

This is the short state of the case, and I believe it is all that is necessary : and the question then is, whether this outstanding term, which is held in trust for Mr. Smith, does or does not protect him against the claim of the Crown ?

The argument on behalf of Mr. Smith turned almost entirely on the statute of uses in courts of equity, and besides that on the doctrine laid down in *Willoughby against Willoughby*, which has never been shaken, and which I hope never will. I take that now to be a leading decision, never to be departed from in cases between subject and subject.

In answer to this case, made on the part of the defendant, irrefragable as between subject and subject, in answer to this case, it was argued, that the case of the Crown is essentially different from that of the subject ; and as far as we are furnished with light on this subject, it does seem that the case of the Crown is essentially different.

In the first place, we find from a variety of authorities, that lands or goods in the hands of debtors or accountants to the Crown, or in the hands of those who are debtors to the debtors of the Crown, or which are held in trust for them, or to their use, are most clearly the subject of an extent.

Further, we find in Pl. Com. 321, in the great case of the mines in the hands of the Crown, there was a great number of the

king's debtors brought into the Court of Exchequer, and there the Court held, that lands which had belonged to the king's debtors, which had been their property after they had so become debtors to the Crown, were subject to the seizure of the king, into whatever hands they afterwards came, whether by descent, purchase or otherwise. Among other cases there cited, is that of Sir Wm. Seyntloo, who married the widow of Sir Wm. Cavendish, who was treasurer of the household. Sir Wm. Seyntloo and his lady were returned terre-tenants, in right of the wife, of certain land which was Sir Wm. Cavendish's, and were called into the Court of Exchequer, and made accountable for the arrears due to the queen for Sir William's office. See Dyer, 224 and 225. It appears from the case, that after Sir William Cavendish became indebted to the Crown, he purchased divers lands, and afterwards aliened them, and took back an estate therein to himself and his wife, and afterwards died without rendering any account, and the terre-tenants (as I have just stated) of the land were charged to answer to Queen Elizabeth for the arrears. These lands might have been seized in the hands of Sir William, and for the same reason they might be seized in the hands of every one who came under him.

In 2 Roll. Ab. 156, the difference is stated between the effect of a sale of land by a debtor to the Crown, when that sale took place before he became a debtor, and a sale afterwards. In Dyer, 160, there is the case of one Thomas Favell, who was a collector of the fifteenth and tenth. He was indebted to the Crown, and being seised of certain lands in fee simple, and having divers goods and chattels, *die intromissionis de collectione et levatione*, of the fifteenth and tenth aforesaid, in extremity of illness aliened his tenements, goods and chattels, to divers persons, and died without heir or executor, and process was issued against the terre-tenants, and possessors of the goods and chattels, to account for the collection aforesaid, and to answer and satisfy the king thereof, &c.; and this by the advice of the Chancellor of England, and the Chief Justice of England, and the other Judges of either bench. It is therefore clear, beyond all doubt, that the land itself may be extended, into whatever hands that land may have been aliened.

The next step which we find in a matter of this kind, is the doctrine which is laid down in Sir Edward Coke's case, and which is mentioned afterwards by Lord Hale in deciding another case, which I shall state by and by. This case of Sir Edward

Coke being of great consequence, the Master of the Court of Wards was assisted by four of the Judges in the hearing and debating of it; and after many arguments at the bar, the said four Judges argued the same in court, viz. Dodderidge, one of the Justices of the King's Bench; Tanfield, Lord Chief Baron of the Exchequer; Hobart, Lord Chief Justice of the Court of Common Pleas; and Ley, Lord Chief Justice of his Majesty's Court of King's Bench.

First of all I would draw your attention to this point, that this is an infinitely stronger case than any of those I have stated. In general the debtor to the Crown was at one time in possession of the land himself; but in this case the king's accountant never had the land in him, the land and debt never centered in the accountant to the Crown.

The case in effect was this:—Queen Elizabeth, by her letters patent, did grant to Sir Christopher Hatton the office of remembrancer and collector of the first fruits for his life, *habendum* to him after the death or surrender of one Godfrey, who held the said office, then in possession: Sir Christopher Hatton being thus estated in the said office in reversion, and being seised in fee simple of divers manors, lands and tenements, did covenant to stand seised of his lands, &c. unto the use of himself for life, and afterwards to the use of J. Hatton, his son, in tail, and so to his other sons in tail, with remainder to the right heirs of J. Hatton in fee, with proviso *of revocation*, at his pleasure, during his life. Godfrey, the officer in possession, died, and Sir Christopher Hatton became officer, and was possessed of the office, and afterwards he became indebted to the queen by reason of the said office; and the question in this great cause was, whether the manors and lands which were so conveyed and settled by Sir Christopher Hatton, might be extended for the said debt due to the queen, by reason of the proviso and revocation in the said conveyance of assurance of the said manors and lands. The debt due to the queen was assigned over, and the lands were extended, and the extent came to Sir Edward Coke; and the heir of John Hatton sued in the Court of Wards to make void the extent; and it was agreed by the said four Justices, and so it was afterwards decreed by Cranfield, Master of the Court of Wards, and the whole Court, that the said manors and lands were liable to the said extent.

The Judges on that occasion cite a great number of cases, and some of them go a great deal farther than I could have well

expected. I shall just mention two or three of them, and it will be unnecessary to state more. One of the cases there cited is, that of *Walter de Chirton*, customer, who was indebted to the king 18,000*l.* for the customs, and purchased lands with the king's money, and caused the feoffor of the lands to enfeoff certain of his friends, with an intent to defraud and deceive the king; and notwithstanding he himself took the profits of the land to his own use, and those lands upon an inquisition were found, and the value of them, and returned into the Exchequer, and there, by judgment given by the Court, the lands were seized into the king's hands, to remain there till he was satisfied the debt due to him; and yet the estate was never in him; but because he had a power (to wit), by subpoena in chancery, to compel his friends to settle the estate of the lands upon him, therefore they were chargeable to the debt. See *Dyer*, 160. *Walter de Chirton*, in that case, never was seised of the said lands; *Chirton* had no remedy in law to have the lands, but his remedy was only in a court of equity.

Another case is that of *Philip Butler*, who was sheriff of a county; and being indebted to the king, his feoffees were chargeable to the king's debt by force of the word *habuit*, for *habuit* the lands in his power. In *Morgan's* case, it was adjudged, that lands purchased in the names of his friends to his use, were extendable for a debt due by him to the king.

There are several other cases cited in *Sir Edw. Coke's* case, and which are also mentioned by *Lord Hale* in the case to which I have already alluded. In a great many of these cases, the lands that were seized for the payment of debts due to the Crown had been held in trust for the king's debtors; and it was no objection that the legal estate was not in them. The ground of decision there was, that they, by an act of their own, might at any time reduce it into possession; they had it in their power, viz. by a subpoena in chancery, &c. to compel their friends to settle the estate of the lands upon them, and therefore they were made chargeable to the debt.

This being an outstanding term held in trust, it is analogous to all the cases of uses and trusts. It was held there to be no objection, that the legal estate was not in him, because it was in his power, by an act of his own, to reduce it into possession.

But the case that comes nearest to the present is that of the Attorney-general against *Sir George Sands*.

Upon an information exhibited here, and proceedings upon it,

a case was made and stated, which was to this effect, viz. Sir R. Freeman purchased lands for the term of ninety-nine years, in his own name, and afterwards purchased the inheritance of the same lands in trust, and then by his will disposed of these lands to the sons of Sir George Sands, his grand-children, born, or which should be born in his life-time, and directed conveyances to be made accordingly by his trustees, and died. At that time Sir George Sands had two sons, Freeman and George, and Freeman died; and after the death of Sir Ralph, Sir George had another son, Freeman, who killed his brother George, for which he was attainted and executed, and no conveyances were made by the trustees, pursuant to Sir Ralph Freeman's will; and the questions hereupon were two: 1st, Whether, as this case is, the term for years was forfeited? 2dly, Whether or no the inheritance in trust was forfeited?

The result in this case was, that, inasmuch as there did not appear to be a tenure, there could be no forfeiture for the felony; because to a forfeiture for felony, and to an escheat, a tenure is requisite, and therefore judgment was afterwards given *quod defendens eat inde sine die*.

This case of Sir George Sands is reported in Hardres, 488, and also in Freeman. I mention this case with greater confidence, because, though Lord Mansfield, in the case of Burgess against Wheate, 1 Blackst. Rep. 123, observes, in delivering his judgment, that it was a family business, and that the circumstances of Sir Geo. Sands' case were compassionate; yet I have the authority of Lord Keeper Henley for saying it was decided on great principles of law.—Having this authority with me at this great distance of time, I conceive it gives it the description I have now mentioned.

Hale, Chief Baron, says, there is no question concerning the forfeiture of the fee simple in trust, for that must arise by escheat, and there can be no escheat, but *pro defectu tenentis*. But here is a tenant *in esse*. If the offence committed had been treason, then there might have been a question, whether the inheritance in this case should be forfeited, in respect that the rent and tenure have a continuance. But whether Sir George Sands shall hold the land discharged of the lease, or that the king shall have the term, is the sole doubt. The king does not gain an interest in a trust by forfeiture, as he does in debt; for there the interest of the bond passes to the king, and process lies to execute it in the king's own name. And it is question-

able, whether the king can have this in point of prerogative, in case of felony; though perhaps more might be said, if the case had been treason. It is the intention of the party that creates and governs uses and trusts; and therefore a lease shall be deemed to attend the inheritance, if it appears the parties intended it should do so, as here it does; and then it is no more than a shadow, an accessory to it, for otherwise it would not be attendant on it. And then it cannot, in this case, go to the felon, but to the administrator of George, the son. And here they are consolidated by the intention of the will, which directs that the trustees shall make conveyances accordingly. Nor is it kept on foot, but only to avoid mesne incumbrances, which might affect the inheritance. And this appears to have been the intention of the parties when the fee was purchased, and therefore the lease ought to go with the fee; and in the cases of leases for years in trust, that have been forfeited, fraud was the ground of it in the cases that have been cited.

Lord Hale says on another occasion, (for this case was twice spoken to by the Court,) I agree, that in the case of the king's debtor, lands in trust for him in fee simple are liable to the king's debt by the common law, *per cursum scaccarii*, which makes the law in such cases; and this appears by precedents *temp.* Henry VI.; and before 4 Henry VII. a trust or use was liable to a statute; and that is the reason of *Chirton's* case in 50 Ass. And it was held, in Sir Edward Coke's case, in *Cris Wardorum*, that if the king's debtors have a power of revocation, that makes them liable to the king's debt; and that was the reason of *Babington's* case, in *Curia Wardorum*, in 30 Car.; and of *Hoad's* case, in *Pasch. 4 Jac.* where lands in trust for a recusant were subjected to the debt of 20 *l. per mensem*: so, in 41 Eliz., *Babington's* case, a trust liable to a debt imprest, because *cestui que trust* has a profit by it, but that is a special case, and grounded on a special course in the Exchequer. He proceeds to state many other cases, which I think it unnecessary to mention.

If you take the converse of this case, I think it will make it still more clear. The reason why the term was not forfeited, was, because the inheritance thereof was not forfeited; but if the inheritance had been forfeited, the term must have been forfeited. In deciding according to the course of the common law, I therefore think it clear that an outstanding term cannot defeat the king's process by extent. In courts of equity it has been said that a purchaser without notice is a person favoured by

that Court. Perhaps it may be a sufficient answer to say, that in the present instance we are not in a court of equity. The question is, What ought to be our decision according to the common law? This question could not be decided in a court of equity: they could not sue for a decree. When a court of equity is resorted to, and this is the situation of the parties, the Court does nothing but stand neuter between such parties, and leaves them to make the most of it.

Now, therefore, I think, on the whole, in the first place, the land is chargeable that has been in the hands of the king's debtors; and from the cases that have been decided it is sufficiently clear, that the term is; it is the whole interest in the land, whether it be divided or not: and so likewise in uses and trusts; and from what is said by Lord Hale, I infer the same doctrine is applicable to the actual case now before us.

It was hinted, that the 33 Hen. VIII. c. 39, sect. 50, 53, and 74, puts the king's debts on the same footing as a *statute staple*; but we find the same difficulty again recurs, for the 33 of Hen. VIII. does not alter the subject out of which the thing is to be paid. If I suppose, in the present instance, they are put on the same footing with statutes staple, the question would return; supposing the king has a debt upon bond, which is to be treated as a statute staple, I do not find the act meddles with the subject out of which he is to compel the payment of his debt, but the act relates singly to the mode by which he is to do it; and if the king were to put it on the footing of a statute staple, it would deprive him of no remedy which the common law gave him. The subject is not at all touched by the statute, but merely the manner in which he is to proceed, which perhaps gives the subject rather more advantages than he had before, though I do not see very clearly in what respect the situation of the king's accountant is altered.

Now that being so, it should seem to be the result of what one finds in the books, that of the king's common-law remedy it is impossible to doubt; and that remedy is given in every case where the party who is indebted to the Crown has a present beneficial interest, as well as a reversion: both of these are considered as chargeable for the debt of the Crown; the lands of the king's debtor may be extended by the Crown, in whatever hands they may be found, and therefore, upon the whole, the judgment of the Court in this case must be for the Crown.

Judgment for the King.

No. XVII.

The Attorney-General v. Lockley and others (b).
Chan. Mich. 9 Geo. II.

This was an information brought to secure a charity, and the case was thus: John Radford, and Anne his wife, were seised in fee, and conveyed the premises by fine and deeds, declaring the uses thereof, to their trustees and their heirs, to the use of them and their heirs, in trust for John Radford and his wife, and the survivor of them, and the heirs of the survivor, with power for the wife, in case the husband survived her, to charge the estate with 400 *l.* The wife died first, and executed her power for charitable uses; John enjoyed the estate during his life; and by will, dated 25th Jan. 1723, he devised the premises in fee to Tudor Lockley. Now this estate was to be sold for discharging the charity and payment of mortgages made by Tudor Lockley: and the question was, whether the sale should be subject to the dower of Tudor Lockley's wife, in case she survived her husband. It was argued by *Noel* in favour of dower, and by *Verney* against it; and the following cases were cited: *Preced. Canc.* 241, 250; *Banks and Sutton, at the Rolls*, March 1733; *Preced. Canc.* 336; *Chan. Rep.* 369; *Show.* 111; *Preced. Canc.* 65; *Cro. Car.* 901; *Ambrose and Ambrose*, determined in the year 1717, in the House of Lords (I).

Talbot, Lord Chancellor. This is a considerable point, and should be settled some way or other; in the first place with regard to the wife, her demand is properly a legal one, and it has been hinted at, as if the legal estate was executed in Mr. Tudor Lockley; but there is no foundation for that, as the estate is limited to trustees and their heirs; therefore it is a legal estate absolutely executed in the trustees, for there cannot be a use limited on a use. Then the question will be, whether Tudor Lockley's

(b) *Vide supra*, p. 455, n.

(I) This is the case in 1 P. Wms. 321. The case was that the deceased husband bought an estate in the name of a third person. The Court considered it clear that the wife was not dowable of the trust estate. It appears by the report, that the decree was affirmed in the House of Lords. I find by the Journals of the House of Lords, that the wife prayed that the estate might be deemed part of the personal estate of her husband, or at least, that she might be entitled to her dower out of it. See *Journ. Dom. Proc.* vol. 20, p. 456.

wife is entitled to dower of an equitable estate of inheritance vested in her husband; for at present the husband is living, and if the wife died before him, then this question never can arise. As dower is a legal demand, so clearly, with regard to a use, a wife was not dowable of it before the stat. Hen. VIII. Vernon's case, 4 Co. 1. Then how can she be dowable of a trust after that statute? For is there any solid distinction between a use before a statute and a trust after it? What was a use but a right to receive the rents and profits of lands of which the legal estate was in another? And a trust is the very same now: and if before the statute the right of the wife was considered strictly as a legal right, so that the equitable interest was not affected by it, the reason holds equally strong since the statute, that courts of equity should follow what was the rule before the statute with regard to those estates. How there came to be a difference as to estates by curtesy, I cannot tell; nor how it came to be extended to estates by curtesy, and yet not to dower, I cannot tell. I do not see, on this general question, whether a wife shall be endowed of a trust estate of inheritance, that there is one case, from the time of the stat. H. VIII. to this time, that is directly in point, except the case of Fletcher and Robinson, Preced. in Canc. 250. That case is extremely short; and the reason given for it is, whether it be a good one or no I shall not say, that the conveyance was considered as fraudulent, being done with an intent to prevent a forfeiture; and therefore, in that case, the Court seems to have disregarded it, which shows it was not determined simply on this point, but on other matters, which do not fall in with this case. The case of Banks and Sutton seems to have been determined on this, that the time of the conveyance was come, and the husband had a right to call for it; and then the Court, upon considering that as done which ought to have been done, might properly assist the wife in that case. The case of Bottomley v. Fairfax, Preced. in Canc. 336, before my Lord Harcourt, is an express authority that a wife is not dowable of a trust estate of inheritance; and to this it may also be added, that it is the general received opinion of every one who has attended this bar constantly, that they are not; and it is the practice to make purchases in the name of the purchaser and trustee—but to what intent or purpose? Only to prevent dower, that by there being a survivor to the purchaser, his wife might not be entitled to it. But if it should be ruled, that a wife is entitled to a dower of a trust estate of inheritance, pro-

visions of this kind would be overthrown. I mention this, because it is hinted at, as if the practice of conveyancers was not of great weight; and truly it is not in their power to alter the law: but when there is a received opinion, and conformity of contracts and settlements thereon, it is extremely dangerous to shake it, which would disturb the possession of many who are very quiet, and think themselves very secure; therefore it ought to be done only on the clearest and plainest ground. In the present case I cannot say they are mistaken, because they have gone on this ground, that trusts are now what uses were at the common law, where a wife was not dowable of a use. There are other cases where terms for years have been carved out, and the inheritance remains in the husband, and as to those there is no difficulty. Where the term is created for particular purposes, and the inheritance remains in the husband, and descends to his heir, which term is not a bar at law of dower, but only prevents the execution of it till the term is expired, there the term may be redeemed; and that was the case of my Lady Dudley, *Preced. in Canc.* 241. There the express limitation of the term was to the owner of the freehold after the trust expired. As to those cases where the inheritance is sold for a valuable consideration, (*Preced. in Canc.* 65,) which was the case of Lady Radnor, and the purchaser took an assignment of the term, if it was without notice, there could be no difficulty; but whether that case was so or not, I do not remember. But the present case is not that of a wife entitled to dower with a *cessat executio*; for the question here is, whether the wife is dowable of an equitable estate of inheritance in fee simple? As to what is said, that this is to be considered as a contract on the part of the wife, therefore equity should supply it; the answer is, equity, where there is a valuable consideration, will supply form. But hath she contracted for this particular estate? No, for nothing but what the marriage implies, which is, that she shall have dower of what she is dowable by law: and then the question comes to this, whether she is dowable by law of a trust? Here she could have nothing of this in contemplation at the time of her marriage: for the equitable interest was left to her husband, long after the time of her marriage, which was in 1713; and the equitable estate was not given him till 1723. Therefore the decree must be, that the land shall be sold and enjoyed, discharged of any claim of dower.

In another manuscript note of this case, Lord Talbot is

reported to have said that trust estates, since the statute of uses, ought to be considered as uses, before the statute, of which estate a woman could not be endowed; that the case of Bottomley and Lord Fairfax was express in point: that, as this method of conveying on purpose to prevent dower, had been used for so many years, a court of equity ought not to make a decree which would overturn such a number of settlements. And the reason of the decree in the case of Banks and Sutton (which he stated) was different: for there the direction of the will was, that the legal estate should be conveyed to Sutton; and the wife married him on the expectation of that estate, and it was a fraud in the husband not to call for the settlement. The other cases of dower of trust estates are, where terms are created for particular purposes, and the inheritance remains in the husband: in these cases she has a title of dower, and so she may come into this Court and redeem the term, which is the case of Lady Dudley.

No. XVIII.

Bret v. Sawbridge and others (c). Before the Master of the Rolls.

Sir John Wroth was seised in fee of the lands in dispute, and mortgaged the same for one thousand years to Francis Hill, as a security for 1,100 *l.*, which, by several mesne assignments and further charges to the amount of 2,400 *l.* in the whole, came to Richard Watson, in trust for Sir Edward Bret; and Brewster (who assigned the same to Watson), covenanted that Sir John Wroth, or his heirs, should convey the inheritance to Sir Edward Bret: and Sir Edward Bret, reciting by his will, that he had purchased of Brewster the residue of the said term of one thousand years, and that there was a covenant in the purchase deed from Brewster as aforesaid, but that Sir John Wroth dying before the conveyances were executed, and leaving an infant of eight years old his heir at law, it was then impossible to have the fee conveyed: therefore Sir Edward Bret declared it to be his will, that when the heirs of Sir John Wroth should attain the age of twenty-one, a conveyance should be executed according to the settlement in tail after mentioned; and he devised the same to John Bret Fisher for life, remainder

(c) *Vide supra*, p. 464.

to trustees, to preserve contingent remainders; remainder to his first and every other son in tail male successively; remainder to Nathaniel Fisher for life, and in the very same manner; and so to Edward Fisher; remainder to the right heirs of Stephen Beckingham and Richard Watson (the trustees of the term), whom he made his executors; *and then he directed the remainder of the term should remain, and be attendant on the inheritance,* according to the limitations above mentioned: and all other his real and personal estate he devised to John Bret Fisher, Nathaniel and Edward Fisher. Upon the death of Sir Edward Bret, the executors proved the will; and afterwards Nathaniel and Edward Fisher died intestate, without ever having any issue; and John their brother took out administration to them. John Bret Fisher, thinking the limitations over to the right heirs of Beckingham and Watson void, took himself to be absolute owner of the term, as co-residuary legatee, and representative of the other two his brothers, in case he should ever die without having issue, and mortgaged the residue of the term for one thousand years to the defendant Sawbridge, as a security for 350*l.* One Newland purchased the reversion, and the equity of redemption, from the right heirs of Sir John Wroth, for one hundred broad pieces; but before the purchase, he promised John Bret Fisher should have the benefit of it, if he would pay him the purchase money, his expenses, and a small gratuity: however, John Bret Fisher, a long time after the purchase was completed, neglected to comply with the terms, and so it was sold to the defendant Sawbridge. John Bret Fisher, by his will, devised all his real and personal estate to the defendant Sawbridge, and made him his executor, and afterwards died without ever having issue.

The plaintiff filed his bill, to have the estate conveyed to him according to the will of Sir Edward Bret, all the precedent limitations being spent, and to have an account of the rents and profits, he being heir at law, and also representative of the personal estate of Richard Watson, who died in the life-time of John Bret Fisher: but Stephen Beckingham is still alive, and made a defendant in this cause.

Sir Joseph Jekyll, Master of the Rolls, after argument on both sides, and time taken to consider of it, delivered his opinion to the effect following: The plaintiff in this case does not want to have the term assigned to him, because he has the legal interest of it in him, as representative of Richard Watson, who was a

trustee of the same for Sir Edward Bret. Then the point to be determined is with regard to the account of the rents and profits. Though Brewster covenanted that Sir John Wroth, or his heirs, should convey the inheritance to Sir Edward Bret and his heirs, yet it does not appear that Sir John Wroth was under any obligation to convey the same; for he was no party to the conveyance to Sir Edward Bret, nor did any thing to show his agreement thereto: but the covenant of Brewster to Sir Edward Bret, being before the statute of frauds, there might be a parol agreement by Sir John Wroth that he would convey, and it would be good; otherwise it would be difficult to account why Brewster should enter into such a covenant. However, Sir Edward Bret, by his will, desiring the heirs of Sir John Wroth to convey the inheritance, and directing the limitations of the same, and that the term should be attendant on it, did intend to devise the inheritance, and not the term in gross. But it is said, though the inheritance cannot pass, the term may, according to the limitations in the will of Sir Edward Bret. It is not necessary now to enter into the question how far limitations of terms are good, or whether, by such limitations as those in the present case, all the prior devisees dying without having had issue, the remainder of this term could vest in the plaintiff as to one moiety. But if I was to deliver my opinion about it, I should be under great difficulty: for on this point there is the opinion of one Lord Chancellor against another; my Lord Cowper, in the case of Higgins and Dowler, 2 Vern. 600, and Salk. 156, held such remainder of a term to be good, all the parties dying without ever having any issue: and by the present Lord Chancellor, there have been two cases determined, Clare and Clare, P. 7 G. II. Saberton and Saberton, 8 G. II. In one of them it may be taken, there was an estate tail in the first taker; but in the other it seems not to be so; but in both of them my Lord Chancellor held such limitations of estates tail, though to persons not in being, and never vesting, to be too remote, and so delivered his opinion. Higgins and Dowler, as it appears to me, was not clearly stated and urged, but was taken as it is reported in Salk. and Vern., which my Lord Chancellor said was incorrectly done in both of them: but I have a complete report of it by two gentlemen; and in the case of Stanley and Lee, M. 8 G. II., I looked into the pleadings and the Register's book; and on the whole matter I find the judgment of my Lord Cowper was, that such limitations never having been in

esse, and so not vesting, the limitation over might be good. There is one case I did not mention, when I gave my opinion in *Stanley and Lee*, and that is *Massenburgh and Ashe*, Chan. Rep. 275, in which the Judges were of opinion, that the limitation of a trust of term must be considered as limitations of a term at law; and that case is stronger for allowing limitations over than this, though that was on a deed, and this is on a will, which has a more favourable construction. But I must leave this point of the limitations of a term for future consideration, if ever it comes before the Court, for this case will turn on a different point (I). Here Sir Edward Bret thought he was

(I) It is very satisfactory to find that Sir Joseph Jekyll did not give up his opinion in *Stanley v. Lee*. The doctrine in the case of *Stanley v. Lee* (2 P. Wms. S. C. MS.) is now well established, and the case of *Clare v. Clare* (For. 21, S. C. MS.) is overruled by a series of authorities. See *Sabbarton v. Sabbarton* For. 55. 245. S. C. MS.; *Knight v. Ellis*, 2 Bro. C. C. 570; *Phipps v. Lord Mulgrave*, 3 Ves. jun. 516. The rule, as now settled, is accurately stated by Mr. Fearne—Whatever number of limitations there may be after the first executory devise of the whole interest, any one of them, which is so limited that it must take effect (if at all) within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which could carry the whole interest, happens to vest; but when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested. Exec. Dev. 4th edit. 415.

In a former edition of this work a discussion was introduced, in this place, on the question, whether the term of twenty-one years, after a life in being, could be taken as a term in gross in the case of an executory devise. This will now be found in n. (2) to the last edition of *Gilbert on Uses*, p. 260. The case of *Beard and Westcott*, there mentioned, was fully argued before the Master of the Rolls, upon the certificate being returned; and on the 17th Dec. 1811, the Master of the Rolls gave the following judgment:—"This case stood over in consequence of a suggestion, that the certificate of the Court of Common Pleas involved in it the decision of a new question, which had not undergone any particular discussion, or received any particular consideration in that Court: namely, how far the validity of a limitation over, by way of executory devise, is affected by the circumstance that the period of twenty-one years, after the duration of an estate for life, has not any connection whatever with the minority of any person taking an interest under the preceding limitations. Now I do understand, that the question certainly did not receive any particular consideration in the Court of Common Pleas, it being taken for granted, that the rule upon this subject stood as it is commonly laid down in the books: namely, that the executory devise falls within the allowed limits, if the event upon which it is to take place must happen within a period of twenty-one years after the life or lives in being. I am not aware, however, that the point has been directly decided; and Lord Alvanley's doctrine in the case of *Thellusson and Woodford*, is against the addition of twenty-one

entitled to the trust of the inheritance, and did not intend to devise the term in gross, but intended to devise the inheritance, and

years, except by way of provision for the circumstance of the devisee being under age, or in *ventre sa mere* at the expiration of the life or lives in being.—And as the question has now been raised, and as there is that degree of sanction to the doubt, it does seem to me desirable, that it should be set at rest by the decision of a court of law; so, therefore, I propose to send the case back again to the Court of Common Pleas, to call their attention to the point, that they may have an opportunity of pronouncing an explicit opinion upon it. I have received this information from some of the Judges.”—The case was accordingly sent back to the Court of Common Pleas, who refused to hear it argued, until the point upon which their opinion was required was stated. Thereupon, the following question, with the approbation of the Master of the Rolls, was stated to be the question for the opinion of the Court: “How far the limitations over, in the event of there being no son or sons of John James Beard, nor issue male of such son or sons living at the death of the said John James Beard, or there being such issue male at that time, they shall all die before they attain their respective ages of twenty-one years, without lawful issue male, are affected by the circumstance, that they are to take effect at the end of an absolute term of twenty-one years, after a life in being at the death of the testator, without reference to the infancy of the person intended to take, or by the circumstance, that there may be issue of John James Beard living at his death, to whom the estate is given by the will (but who would be incapable of taking according to the above certificate), for whose death, under twenty-one, the limitation over, in the event before mentioned, must await.”—The case has since been argued before the Judges of the Court of Common Pleas, and they certified, that the limitations over, in the event of there being no son or sons of John James Beard, nor issue male of such son or sons living at the death of John James Beard, or there being such issue male at that time, they shall all die before they attain their respective ages of twenty-one years, without lawful issue male, are not affected by the circumstance, that they are to take effect at the end of an absolute term of twenty-one years, after a life in being at the death of the testator, without reference to the infancy of the person intended to take, nor by the circumstance that there may be issue of John James Beard living at his death, to whom the estate is given by the will, but who would be incapable of taking according to the former certificate from the Judges of this Court, for whose death, under twenty-one, the limitation over, in the event before mentioned, must await. The case is now reported in 5 Taunt. p. 393. It has been argued before the Lord Chancellor, who sent the case to the Court of King’s Bench. It was argued in that Court, and the Judges certified, that John James Beard, the grandson and heir at law of James Beard the testator, took, under the said testator’s will, an estate for ninety-nine years, determinable with his life, in the freehold estates devised to him in the first instance, and also in the leasehold estates, if they should so long continue; and that upon his death, leaving one or more sons, his first son will take an estate for ninety-nine years, determinable with his life, in the freehold estates, and what shall then remain of the terms for which the leasehold estates are held. And that all the limitations, subsequent and expectant upon the limitation to the first son of John James

that it should attract the term; *Whitechurch v. Idem*, 10th Feb. G. I. A man being seised of a reversion in fee, and having the trust for a term for years to attend it, made a will of his own hand-writing, and thereby carved out several limitations of the land and premises, not unlike those now in question; but did not publish it in the presence of witnesses; and the doubt was about the limitations of the term; for the will could not pass the inheritance, being not executed according to the statute of frauds. But it was insisted, it might carry the term as the personal estate, upon which the opinion of the Court was taken. But it was determined, it should not pass, because the deviser intended to pass an inheritance, and the writing under the testator's own hand was looked on as an inchoate act to pass the inheritance, and therefore could not operate on the term. Besides, the testator in that case having prepared a writing which was intended to be executed according to the statute, there was no notice taken of any term that should be attendant on the inheritance, as there is in the present case, which makes it stronger against the plaintiff than it was in that case. That case looks like an authority that must govern the present case; for though Sir Edward Bret was not entitled to the trust of the inheritance, yet he thought Sir John Wroth was bound to convey, and on that assurance and persuasion made his will and intended to pass it as an inheritance. There are several cases, where a man intended to pass something, and yet the law will not allow it; as in case of a devise, where there is an uncertainty either of the person or the thing, *à fortiori* here it should be void, because the testator intended to pass what he had not, for he intended to pass the inheritance when he had it not; and there is a great difference between real and personal estates, as to being assets or not, and also as to the course of succession to whom the same shall go after the death of the owner; and there is likewise a difference where a will is made as to the limitations of the one and of the other; therefore when the testator intended to pass an inheritance and had it not, there is no reason to suppose he designed to pass a term in gross; for he says the term shall be attendant on the inheritance according to the

Beard, are void. 5 Barn. & Ald. 801; and that certificate has been confirmed by the Lord Chancellor, 1 Turn. p. 25. The point has again been agitated in the case of *Bengough v. Edridge*, which now stands for judgment, and will be carried to the House of Lords.

limitations mentioned in the will; and so, as to passing the term, the testator had not *animum testandi*: therefore I conceive the bill must be dismissed.

No. XIX.

Forshall v. Cole and Short (d), Ch. 27th Nov. 1733.

The Master of the Rolls sitting for the Chancellor.

Bill was brought to have a bond delivered up, and proceedings at law upon it to be stayed; the bond was entered into on this occasion: one Durant, in 1728, made a mortgage to plaintiff, but, before this, had given a bond to Cole for 200*l.* Cole, in 1725, obtained judgment upon his bond, and afterwards, since the date of the mortgage, took out an *elegit*, and extended the mortgaged premises towards satisfaction of his judgment; upon this, plaintiff, to save expense and discharge the lands, gave Cole a bond for the 200*l.* and interest; but it was agreed between them, that the bond should be deposited in Short's hands, and only to be made use of if Cole's judgment was entered so as to affect the lands precedent to plaintiff's mortgage. The judgment was signed in 1725, but not docketed, *secundum stat.* 4 & 5 W. & M. c. 20, till 28th January 1730.

Upon reading the statute the *Master of the Rolls* was of opinion that judgments cannot be docketed after the time mentioned in the act, viz. the last day of the subsequent term in which they are entered, and that the practice of the clerks docketing them after that time is only an abuse for the sake of their fees, and ineffectual to the party; and he said he would speak to the Judges about it.

Solicitor-General.—It is proved in the cause, that the mortgagee had notice of the judgment at the time of the mortgage.

Master of the Rolls.—Notice is not material, the statute not making a difference between a mortgagee with notice or without; and besides, the notice which the act requires is the docketing, which by the act is become a constructive notice; and therefore he decreed the bond to be delivered up and cancelled, and that the plaintiff should have his costs both at law and in this Court, and that the 10*l.* which plaintiff had paid upon the bond, should be returned, which he said the attorney concerned in entering the judgment ought to pay out of his own pocket;

(d) *Vide supra*, p. 486, 684, 685.

and that he believed an action on the case would lie against him, for he believed it was owing to his negligence that the judgment was not rightly entered: and the defendant Short having delivered up the bond to Cole, and permitted him to proceed at law upon it, contrary to his trust, he decreed costs as against him likewise.

No. XX.

Burton and others v. Todd.

Todd v. Gee and others (e).

31st March 1818. *Judgment by Sir Thomas Plumer,
Master of the Rolls.*

These two causes are now to be disposed of. The first cause was instituted in May 1804, by Messrs. Gee and Osborne, and Mrs. Burton, the trustees under the will of Mr. Burton, against Mr. Todd, for a specific performance of an agreement to purchase an estate; which agreement was entered into in August 1802.

In June 1806, the common order for a reference to the Master, whether a good title could be made to the estate, was obtained by the plaintiffs in this suit.

In Dec. 1807, the Master made his report that a good title could not be made. To this report the plaintiffs took an exception, which was overruled in May 1809; no further proceedings have been taken in this suit.

In October 1808, Mr. Todd instituted a suit against Messrs. Gee and Osborne, the trustees, and against the persons interested in taking the accounts under the will of Mr. Burton, to have the necessary accounts taken, and for a specific performance of the agreement, and for a compensation as to the two hundred and twenty-seven acres in the agreement mentioned to be tithe-free, or subject to a very trifling modus.

In December 1813, a decree was made in this cause, whereby it was referred to Mr. Steele to take the necessary accounts and inquiries, in order to ascertain whether a good title could be made to the estate in question; and to state whether a good title could be made thereto.

In December 1816, the Master made his report; stating, that a good title could be made to the estate in question, except as

(e) *Vide supra*, p. 510.

to the two hundred and twenty-seven acres in the agreement mentioned to be tithe-free, or subject only to a very trifling modus, and which the Master reported not tithe-free, or subject to a very trifling modus.

The decree, therefore, in the second suit, is nearly of course. The plaintiff, Mr. Todd, is entitled to a specific performance, and to a compensation for the tithes of the two hundred and twenty-seven acres. The only questions are, 1st. As to the principle on which the account must be taken: and 2dly, As to the costs.

By the agreement in August 1802, it was stipulated that the purchase-money should be paid by instalments; one third on the 10th October 1802; one third on the 5th January 1803; and the remaining one-third on the 5th April 1803, on a good title to the estate being then made.

The purchaser paid the first instalment, amounting to 5,333*l.* 6*s.* 8*d.* on the 10th October 1802, and the vendors have ever since had the same in their possession, and have also received all the rents and profits of the premises; the plaintiff, Mr. Todd, never having been let into possession of any part of the premises. An abstract was delivered in April 1803, and was returned by Mr. Todd, with the objections of counsel, before May 1803; and the principal objection taken to the title was, that the title could not be approved unless the necessary accounts were taken in a court of equity. The vendors insisted that the purchaser was not entitled to have the accounts taken; and instituted their suit in May 1804, to compel the purchaser to take the estate without having the accounts taken; they failed in that attempt, and Mr. Todd having subsequently instituted the second suit for the purpose of having the accounts taken, was resisted by the vendors, but succeeded.

The vendors then having been uniformly wrong, and the purchaser uniformly right, and the vendors having been in possession of one third of the purchase-money, and in the receipt of all the rents and profits of the estate for upwards of fifteen years; the question is, upon what principle are the accounts to be taken? The usual rule is, that the purchaser is to have the rents, and to pay 4*l. per cent.* for his purchase-money. This rule is rather hard where the delay is not caused by the purchaser. The rents seldom yield 4*l. per cent.*; and the purchaser having been kept out of the enjoyment of the estate, receives it at last in a worse condition. In the present case, fifteen and a

half years delay has been caused by the resistance of the vendors; during that time they have had the enjoyment of nearly 6,000 *l.* of the purchase-money (which in that period would be doubled); and have also received all the rents: to decree the usual accounts, would be to give the party who is wrong, all the advantage of the delay occasioned by himself: it would be to reward the party who has done wrong, and to give him a double benefit, and to work injustice to the party who has been uniformly correct. The cause is novel, there is no precedent. It may be said, that Mr. Todd might have applied to have the 5,333 *l.* 6 *s.* 8 *d.* or the rents and profits, brought into Court and laid out, but he has not done so, and the vendors have reaped the benefit of his not doing so.—Under these circumstances, the vendors must account, not only for the rents and profits of the estate from October 1802, but also for interest, after the rate of 4 *l. per cent.* upon one third of the rents and profits.

As to the costs. The original bill must be dismissed with costs, because the vendors, apprised of the objection, instituted an improper suit. As to the second suit. The vendors took no steps to amend the original bill, and to frame it properly to obviate the objection to the title. Mr. Todd had therefore no means of obtaining a specific performance of the agreement, but by the institution of the second suit; the vendors resisted and failed; Mr. Todd succeeded, and a specific performance was decreed. There was no inconsistency on the part of Mr. Todd. The will of Mr. Burton rendered it necessary that the accounts should be taken. All the parties to the second suit were interested in the accounts. The vendors must be at the expense of clearing the title, by taking the accounts; and, therefore, Mr. Todd is entitled also to the costs of the second suit.

No. XXI.

Rea v. Williams, Exch. (f).

The plaintiff Rea and one Pritchard purchased jointly a lease made by the Duke of Beaufort for the life of another person, and they jointly took the profits of it for some time; but afterwards they conveyed the estate to the defendant Williams, in consideration of 300 *l.* as was expressed in the conveyance, though no part of the money was ever paid, and Williams ac-

(f) *Vide supra*, p. 617, 618.

known by his answer, that he was a mere trustee for the parties; but no declaration of trust was ever executed, nor did it any way appear with what view the estate was vested in the defendant, any further than it was believed it was done to screen it from execution, they being both of them much indebted. Afterwards Pritchard died intestate, and the defendant Williams took out administration to him, but there was not assets enough to pay all his debts. This cause came on to a hearing on the bill and answer, and the question was, whether the trusts of the estate belonged to Rea the survivor, as the whole estate indisputably would, if the legal estate had continued in the two purchasers? To prove the trust would survive, were cited 1 Vern. 217; Eq. Cas. Abr. 291; 2 Vern. 556, 683.

Mr. *Wilbraham*, to show this trust did not survive, took a distinction between 2 Vern. 556, and the present case; for there, he said, was an express limitation of the trust to the two daughters, so they might take jointly; but this is a resulting trust only, and no express limitation; and equity, which discourages joint tenancies, may construe that to be a tenancy in common; Salk. 158. If a joint tenant for years mortgages his part of the term, this is a severance of the joint tenancy, 2 Vern. 683.

Reynolds, Chief Baron.—I think the joint tenancy of the trust in this case was not severed: every one who has an estate has two rights in him, a legal estate and an equitable interest; nothing passed by the conveyance to the defendant but the legal estate, and the equitable interest resided in the two purchasers, and remained as it originally was, the consequence of which is, that it must go to the plaintiff by survivorship. Carter, Thompson and Fortescue were of the same opinion; and Fortescue said, he saw no difference between an express and an implied trust.

No. XXII.

Lechmere v. Lechmere (g), Ch. E. T. Geo. II.

This case was elaborately argued upon the appeal. The argument lasted four days. Upon the first question Lord Talbot delivered his opinion at considerable length. Upon the second question he pronounced the following judgment:

The second question is as to the satisfaction, whether what descended to the heir at law is to be considered as a satisfac-

(g) *Vide supra*, p. 641, 642, 643.

tion of what he is entitled to under this covenant. As to questions of satisfactions where they are properly so, they have always been between debtor and creditor or their representatives. As to Mr. Lechmere *I do not consider him as a creditor, but as standing in the place of his ancestor*, and thereby entitled to what would have vested in his ancestor. A constructive satisfaction depends on the intention of the party, to be collected from circumstances. But then the thing given must be of the same kind, and of the same or a greater value. The reason is plain, for a man may be bountiful as well as just; and if the sum given be less than the debt; it cannot be intended as a satisfaction, but may be considered as a bounty; and if the thing given is of a different nature, then, also, as the intention of the party is not plain, it must be considered as a bounty. But I do not think the question of satisfaction properly falls within this case, for here it turns on what was the intention of my Lord Lechmere in the purchases made after the articles, for as to all the estates purchased precedent to the articles, there is no colour to say, they can be intended in performance of the articles; and as to the leasehold for life, and the reversion in fee expectant on the estates for life, it cannot be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee simple, in possession, &c.) though considered as a satisfaction to a creditor, yet they do not answer, because they are not of equal or greater value. Yet why may they not be intended as bought by him with a view to make good the articles? The Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. Parts of the land purchased are in fee simple, in possession, in the south part of Great Britain, and near to the family estate. But it is said they are not bought with the liking of the trustees. The intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, is no reason to hinder why they should not be bought in performance of the articles. It is objected, that the articles say the land shall be conveyed immediately. It is not necessary that every parcel should be conveyed so soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the

same articles. Whoever is entitled to a performance of the covenant, the personal estate must be first applied so far as it will go, and if the covenant is performed in part, it must make good the deficiency. But where a man is under an obligation to lay out 30,000*l.* in lands, and he lays out part as he can find purchases which are attended with all material circumstances, it is more natural to suppose these purchases made with regard to the covenant than without it. When a man lies under an obligation to do a thing it is more natural to ascribe it to the obligation he lies under, than to a voluntary act, independent of the obligation. Then, as to all the cases of satisfaction, though these purchases are not strictly a satisfaction, yet they may be taken as a step towards performance, and that seems to me rather his intention than to enlarge his real estate. The case of Wilcox and Idem, 2 Vern. 558, though there are some circumstances that are not here, yet it has a good deal of weight with me. There the covenant was not performed, for the estate was to be settled, but the land was left to descend, and a bill was brought to have the articles made good out of the personal estate; to which it was answered, that the 200*l. per annum* was bought, which descended to you. It is true a settlement hath not been made, but they were bought with an intention to make a settlement, and you can make one. The same will hold as strong in the present case, that these lands were bought to answer the purposes of the articles, and fall within that compass, and it is not an objection, to say they are of unequal value, for a covenant *may be executed in part, though it is not so in satisfaction; and in this particular I differ from the Master of the Rolls.* There must be an account of what lands in fee simple in possession were purchased after the articles entered into, and so much as the purchase money of such lands amount to must be looked on in part of satisfaction of the 30,000*l.* to be laid out in land under the articles, and the residue of the 30,000*l.* must be made good out of the personal estate.

No. XXIII.

Abstract of the Special Verdict, in Fairfield v. Birch (h).

Edmond Kelly, being seised in fee in 1747, made a settlement before his intended marriage, in consideration of the wife's portion, as to part to trustees in fee, in trust to sell and pay off

(h) *Vide supra*, p. 655.

incumbrances, which amounted to 4,000*l.* As to the residue, to himself for life, remainder to trustees in the usual way, to preserve remainders; remainder to the use, that the wife might receive a jointure rent-charge, in bar of dower; subject thereto, to the first and other sons of the marriage successively in tail-male; remainder to the first and other sons of Edmond Kelly, by any other wife, successively in tail male; remainder to two brothers of the settler and their issue male in strict settlement; remainder to Ignatius Kelly the uncle of the settler for life; remainder (after a limitation to trustees to preserve) to his first and other sons successively in tail male, with the reversion to the settler's right heirs. Power to the settler if he survived his wife, having issue by her a son, to jointure any after-taken wife, to the extent of 50*l.* a year; and if no issue male, of 100*l.* a year; and if no issue, 150*l.* a year, and 2,000*l.* for younger childrens portions. Covenants for title and further assurance. Power to the settler to charge 500*l.* but not to affect the jointure. Proviso, that if the settler and his brother should die without issue, the estates should stand charged with 2,000*l.* for the sisters of the settler, or their issue.

The lands vested in the trustees in fee, were sold to Robert Birch, under a decree for the payment of the incumbrances, which were accordingly paid out of the purchase money.

Robert Birch had notice of the settlement of 1747, in the year 1755.

Ann Kelly died in the life-time of Edmond, previous to the 2d May 1758, without having had issue.

Edmond, on the 2d of May 1758, on his marriage with Harriet Hincks, in consideration of a portion of 2,500*l.* settled the estates to himself for life, remainder to trustees to preserve, remainder to the intent that the intended wife might receive a jointure rent-charge of 300*l.* per annum, if there should be issue, and subject thereto, to the first and other sons of the marriage successively in tail male; remainder to Edmond the settler in fee.

15th July 1761, Edmond, for a valuable consideration, conveyed to Robert Birch the settled estates in fee. Part of the consideration the jury found to be the debts for which the estates under the decree had been sold.

The brothers of Edmond died in his life-time unmarried, and without issue.

The lessor of the plaintiff was the grandson of Ignatius, the *uncle*.

Edmond, the settler, died in 1768, without ever having had issue.

The lessor of the plaintiff claimed under her father, Robert Birch's will, and was entitled to a portion under a term of years, created by his marriage settlement, which was made in consideration of his intended wife's portion.

No. XXIV.

Sloane v. Cadogan.

Rolls, December 1808 (i).

Under a settlement made previously to the marriage of Earl Cadogan and Frances, his wife, the sum of 20,000*l.* was assigned to trustees upon certain trusts, under which, William Bromley Cadogan, one of the children of the marriage, became entitled, subject to his father Lord Cadogan's life interest therein, to one fourth share of the 20,000*l.*, which sum was afterwards invested in the 3 per cent. reduced annuities, in the trustees names. By an indenture, bearing date the 26th May 1788, William Bromley Cadogan assigned to William Rose, William Bulkley, Duncan Stewart, and Alexander Graham, their executors, administrators and assigns, all such part, share or proportion, as he the said William Bromley Cadogan was entitled to as aforesaid, expectant on the decease of the Earl, his father, of and in the said sum of 20,000 *l.*, and all the interest which after the decease of the Earl should become due in respect of such share.—To hold the same immediately after the death of the said Earl, and subject to his life estate or interest therein, in the mean time, unto the said William Rose, William Bulkley, Duncan Stewart, and Alexander Graham, their executors, administrators and assigns. Upon trust, immediately after the decease of Lord Cadogan, by and out of the first monies which should be received by, or come to their hands, by virtue of the same indenture, to pay 1,000*l.* to such person or persons, and for such uses, intents and purposes, as he the said William Bromley Cadogan should, by any writing or writings under his hand, direct or appoint; and, in default of such direction or appointment, then to pay the said sum of 1,000*l.* unto the said William Bromley Cadogan, or his assigns, to and for his and

(i) *Vide supra*, p. 658.

their own use and benefit. And upon trust, to place out or invest the residue or surplus of the said monies and premises, as soon as might be, after the same should be received by them the said trustees, in such stocks, funds, or securities as therein mentioned; and to stand possessed of all the said residue of the said trust monies which should remain after payment of the said sum of 1,000*l.* and of the said stocks, funds or securities; upon trust to pay unto or authorize the said William Bromley Cadogan and his assigns, to receive the interest, dividends, and annual produce, for life; and after his decease, and, in case his wife, the plaintiff, should be then living, upon trust to pay unto or authorize her and her assigns to receive the interest, dividends, and annual produce thereof for her life, for her and their own use and benefit, the same to be in lieu of dower; and immediately after the decease of the survivor of the said William Bromley Cadogan and plaintiff, upon trust, to pay, assign and transfer the said residuum, and the stocks, funds, or securities for the same, in such manner for the benefit of the issue of the marriage between them the said William Bromley Cadogan and plaintiff as therein mentioned; and "for default of such issue, upon trust to pay, assign and transfer the same to such person or persons, and upon such trusts, for such uses, intents and purposes, and by, with, under and subject to such powers, provisos, charges, conditions, and limitations over, as he the said William Bromley Cadogan, at any time or times during his life, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered in the presence of, and attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature of, or purporting to be his last will and testament, to be by him signed and published, in the presence of, and attested by such and the like number of witnesses, should direct, limit or appoint; and in default of such direction or appointment, or in case of any such and the same should not be a complete disposition thereof, then upon trust to pay, assign and transfer the said residue, and the stocks, funds or securities, for the same, or so much thereof, whereto any such direction or appointment as aforesaid should not extend, to the said Earl Cadogan (his father) his executors, administrators and assigns, to and for his and their own use and benefit. And, in the same indenture is contained a proviso empowering the said William Bromley Cadogan and his wife, the plaintiff, at any time during their joint lives, to revoke the

said trusts, or any of them, and to appoint or limit new or other trusts in the manner therein mentioned. The 3 per cents. were sold, and the produce lent to the Earl in 1786, upon real security, by way of mortgage.

William Bromley Cadogan, on the 11th May 1789, made his will, which was signed and published by him in the presence of and attested by two credible witnesses, and thereby directed his executrix to sell a leasehold estate at Reading; “and as to the money arising from the sale thereof, I give the same to my executrix; and as to all the rest and residue of my estate and effects whatsoever, I give and bequeath the same to my dear wife Jane Codogan.” And he appointed her his sole executrix. And the said testator shortly afterwards made a codicil to his will, which was not attested, in the words following: Whereas, by marriage settlement, I have given to my dear wife Jane Cadogan for her life, the whole interest of the moiety of my mother’s fortune which was settled upon me, as will appear by the settlement itself, reserving to myself 1,000 *l.* for my own private use. And whereas I borrowed at Midsummer 1789, of Mr. William May, of Bingfield Mill, the sum of 600 *l.* at 4½ per cent. interest, and gave as security for the same the joint bond of myself, the Reverend Mr. Bulkley, and Mr. William Simmonds Higgs, of Pangbourn-lane, Reading; I hereby direct, that the above-mentioned 1,000 *l.* be appropriated to the discharge and payment of the said bond; and if it should be convenient to my dear and honoured father, the Right honourable Lord Cadogan, to pay the said sum of 600 *l.* to the aforesaid Mr. May, of Bingfield, and to take to himself the 4½ per cent. interest, and deduct the whole principal and interest out of the moiety of my mother’s fortune, which comes to me and my heirs at his decease, I shall esteem it a great favour added to the many I have received from him before. And the testator afterwards made a codicil to his will, also not attested, in the words following: In November 1790, Lord Cadogan was so kind as to pay the above-mentioned 600 *l.* for me to Mr. May, of Bingfield, by the which fatherly act of goodness, added to many others of the same kind, I am freed from all debts and incumbrances whatever, excepting an annuity of 10 *l.* a year, which I am engaged to pay to Mrs. Warsand, Mrs. Cadogan’s aunt, now living at Paradise-row, Chelsea, for her life; and also to pay the expenses of her funeral.

There was no child of the marriage between the testator and

his wife. The testator did not, in his life-time, in any manner, execute his general power of appointment in the indenture of 26th May 1783, or his power of appointment of the said sum of 1,000*l.* unless by his will; nor did he, together with the plaintiff, execute their joint power of revocation therein contained.

The plaintiff claimed to be entitled to one fourth part of the 20,000 *l.* and the bill was filed against the executors of the Earl of Cadogan, to establish her right.

The defendants, in their answer, stated, that the Earl paid off the 600*l.* and interest, mentioned in the codicils, and they submitted, that they became entitled to be repaid such sum out of the 1,000 *l.*; and they claimed to be entitled to the whole of the fourth share of the said William Bromley Cadogan, subject to the plaintiff's right to the interest for her life (save and except the aforesaid 1,000 *l.* part thereof,) under the indenture of 26th of May 1783.

Mr. Richards, Mr. Stephen, Mr. Bowder, and Mr. Sugden, for the plaintiff. The argument of the latter, which in a great measure was a repetition of the arguments before urged, is the only one of which he is enabled to give the reader a full note.

It was to the following effect:—

The first question is as to the 600 *l.* The defendants might as well contend that they are entitled to an account of every sum advanced by the Earl to his son. In every case, between a father and child, a provision by the father is deemed an advancement for the child, on account of the connection of blood. If a father purchase in the name of a child, *primâ facie*, it is an advancement for the child, and the evidence to rebut this lies on the father; whereas, if a purchase be made in the name of a stranger, the presumption is otherwise, and the evidence to rebut it lies on the stranger. Besides, if the question here was between strangers, payment might be pleaded although twenty years have not yet elapsed. Lord Mansfield laid it down that sixteen, eighteen or nineteen years were sufficient whereupon to found the presumption of payment (*Mayor of Hull v. Horner*, Cowp. 109; *Oswald v. Leigh*, 1 T. Rep. 270), and Lord Erskine so considered the rule (*Hillary v. Waller*, 12 Ves. 266). And even if payment would not be presumed, yet a jury would, in this case, be directed to find a release. (*Washington v. Brymer*, App. to Peake's Evid.) —[This point was given up by the defendants.]

The principal question, however, is, whether the power is executed; and first, whether it is executed by the will alone? I must admit, that in general a sweeping disposition, however unlimited in terms, will not include property over which the testator has merely a power, unless an intention to execute the power can be inferred from the will. But great Judges have disapproved of this rule. Lord Alvanley, in *Langham v. Nenny*, 3 Ves. jun. 467, wished that the rule had been otherwise, and that it had been held that a general disposition would operate as an execution of the power; and in *Nannock v. Horton*, 7 Ves. jun. 391, Lord Eldon said, that he was not sure that the rule, as now established, did not defeat the intention nine times out of ten. In favour of the rule it has been said, that to overturn it would be to destroy the distinction between power and property. That I deny. The marked and only material distinction between power and property is, that in the case of absolute property, although the party make no disposition of it, yet it will descend to his representatives; whereas a person must actually execute his power, or the fund will go over to the person to whom it is given in default of appointment. But why should not the same words operate as an execution of the power which would pass the absolute interest? Where is the distinction as to the purposes of disposition between a general power like this and the absolute interest? If the solemnities required by the power are adhered to, it would startle a man of common sense not versed in legal subtleties to understand so refined a distinction. As therefore the rule stands upon no principle, and has been regretted by great Judges, the Court will be anxious to distinguish cases, and not to consider every case as within this general rule. Now there is not a single case in the books which governs the present. Ours is a peculiarly strong case. The gift to the Earl in default of appointment was without consideration, and the parties had a power of revocation. The persons who prepared the settlement did not understand the distinction between power and property. They gave the 1,000 *l.* to such persons as Mr. C. should appoint, and in default of appointment to him and his assigns. There the power was merely nugatory: it was not larger than the gift, nor different from it in effect. Besides, here the property moved from Mr. Cadogan; the settlement as to the Earl was merely voluntary, and the power was part of Mr. Cadogan's old dominion, and consequently the execution of it must receive a favourable interpretation. In this respect all the cases are dis-

tinguishable. *Moulton v. Hutchinson*, 1 Atk. 558 ; *Andrews v. Emmott*, 2 Bro. C. C. 297 ; *Buckland v. Barton*, 2 H. Blackstone, 130 ; *Croft v. Slee*, 4 Ves. jun. 60 ; *Nannock v. Horton*, 7 Ves. 391 ; and *Bradley v. Westcott*, 13 Ves. 445, are all cases where the power was given by one person to another, and cannot be compared to our case, where the power was reserved by the party over his own property. There are two cases, I must admit, where nearly the same circumstances did occur. *Ex parte Caswall*, 1 Atk. 599 ; *Bennet v. Aburrow*, 8 Ves. 609. But the first case came on merely upon a petition ; and Lord Hardwicke said he would not say what his opinion would be if it came on upon bill and answer. Besides, Lord Hardwicke overruled this case by a later determination, as I shall presently show. In the last case the property in default of appointment was given to the next of kin, which may be thought to distinguish it from ours. But if there is no authority against the plaintiff, there are two very considerable cases in her favour. The first is *Maddison v. Andrews*, 1 Ves. 57. There a man made a settlement, reserving to himself power to charge, limit, or appoint the estate with any sum not exceeding 1,000*l*. By his will, without making the slightest reference to his power, he gave some legacies, and then charged all his estate with the payment of his debts and legacies. Lord Hardwicke held that the power was part of the old ownership ; and that it was but a shadow of difference that he had charged all his estate ; whereas this was before settled to uses, for these powers to the owner were to be considered as part of the property. Now this is precisely our case, and to decree against the plaintiff your Honor must overrule Lord Hardwicke's decision. The other case is *Standen v. Standen*, which has been already so justly relied on. It is impossible to read that case without seeing that Lord Rosslyn would have decided it on the ground of the power being equivalent to the ownership, even if the circumstance had not occurred to which the decision is generally referred—that the testatrix had no real estate except what was subject to the power. And yet in that case the power was a gift by a will from a husband to his wife, and was not, as in our case, a part of the donee's old dominion.

But if the will of itself is not an execution of the power, that and the codicil taken together certainly are. The operation of a codicil even in respect of real estate is to republish the will, and pass after-purchased estates, although not noticed, if executed according to the statute of frauds. *Piggott v. Waller*, 7 Ves.

jun. 98. And where, as in our case, new matter is introduced, it forms an integral part of the will, in the same manner as if it had actually been inserted in the will at the time of its execution. And on this ground a codicil may explain a doubtful expression in the will, or may give an estate by *implication*, where the testator refers to what he supposes he has done by his will, although the disposition in the will is not what he states it to be. *Hayes v. Foorde*, 2 Blackst. 698; *Beable v. Dodd*, 1 T. Rep. 193. In our case the words in the will are sufficient, if an intention appeared to execute the power, and as such an intention does appear by the codicil which forms part of the will, they both together amount to an execution of the power. It is impossible to misunderstand the words in the codicil, “ which comes to me and my heirs at his decease.” They admit of but three constructions—1st. He considered the fund as having passed to his devisee, who was his *hæres factus*: or 2d, he adverted to its going to his *hæres natus*, or child under the settlement: or 3d, he looked to the event of its going to his father, the Earl, in default of appointment. The 2d cannot be the right construction; for if there was issue to take the fund, their right would prevail over the testator’s, and the Earl could not retain his debt out of a fund which would in that event belong to them. The last construction is absurd: it would amount to a request, as has been already shown, to a man to pay himself a debt out of his own money.—But he considered the property as having passed to his wife; and as he knew that it was in the hands of his father, who had a life-interest in it, he requested him to retain the money out of it, and not to let his wife be troubled for it till the property given to her fell into possession. This then clearly establishes the first construction. Our case must not be compared to *Holmes v. Coghill*, 7 Ves. 429, 12 Ves. 206; for there the power executed by the will was discharged before the execution of the codicil.

It will, however, I suppose, be objected, that the codicil is not attested, and consequently cannot be deemed an execution of the power. But it is sufficient where a power is executed by several instruments, that the principal one is duly executed. *Earl of Leicester’s case*, 1 Ventr. 278. The will and codicil amount together to an execution of the power. But I need not insist upon this, because the plaintiff being a wife is entitled to have the defect in the execution supplied; and it is not material that she is in part provided for, because the husband is the judge of the quantum of provision; nor is it material that the provision was

made *after* marriage, although to constitute a good settlement of realty, as against a purchaser, a settlement after marriage is merely voluntary. *Fothergill v. Fothergill*, 2 Freem. 256; *Hervey v. Hervey*, 1 Atk. 561; *Churchman v. Harvey*, Ambl. 335.

But strong as these grounds are, they are not the only ones upon which the plaintiff's case may be rested. I mean to contend, that the supposed settlement of Mr. Cadogan was merely tantamount to articles, that the gift to the Earl was voluntary, and consequently cannot be enforced by this Court, and that it is immaterial that the funds are now actually vested in the executors of the Earl. I may admit, that if we asked the Court to execute the articles they must be executed *in toto*. But we do not require the aid of the settlement to support our title; we are content to take this fund as part of Mr. Cadogan's property discharged from this settlement. To constitute an actual settlement, so as to enable a volunteer to claim the benefit of it, it is absolutely necessary that the relation of trustee and *cestui que trust* should be established. Here Mr. C. did all he could; but that is not enough. He could not make an actual transfer. The trustees in whom it was vested would not have been authorized in transferring it of their own authority to the trustees of Mr. C.'s settlement. *If a man is seised of the legal estate, and agrees to make a voluntary settlement, it cannot be enforced. Can it make any difference that the legal estate happens to be outstanding?* Certainly not. As the settlement therefore was not completely perfected, the Earl could not enforce it. It will not be pretended that there is any consideration as between a child and father, which will call for the interference of this Court. The father is as a mere stranger. It was so as to covenants to stand seised; and this Court does not even advert to every consideration which is sufficient to raise a use under a covenant to stand seised. In *Stevens v. Trueman*, 1 Ves. 73, where an agreement by a child, to settle an estate in the events which had happened on her father, was enforced, it was not even hinted that there was any consideration as between the child and father; but the decision was grounded on the gift by the father of 500*l.* to the child. And in all the cases on this subject, it will be found that the decisions proceeded on the ground of some consideration given for the settlement on the strangers. *Goring v. Nash*, 3 Atk. 186, was the mere case of a settlement by a father on his younger daughter. *Osgood v. Strode*, 2 P. Wms. 245, was an actual

purchase by the grandfather of the limitations to his grandchildren. Vernon and Vernon, in the same book, 594, turned upon something like a moral consideration. Lord Chancellor King did not consider it a voluntary conveyance, 2 Kel. Cha. Ca. 10. Besides, there the Court relied upon the covenant which might be enforced at law; and, therefore, to prevent circuitry, they enforced a performance *in specie*. But even that doctrine is now overruled, Hale's case, Ch. 1764; and in our case there is no covenant. The general doctrine in these cases is recognized in Colman v. Sarrel, 1 Ves. jun. 50; followed by Ellison v. Ellison, 6 Ves. jun. 656. In this case, it is not material that the fund is actually vested in the defendants; because it is vested in them in a different right.—This Court will never permit a mortgagor under a settlement to claim the fund in a different character. In Ellison v. Ellison, Lord Eldon considered, that when the relation of trustee and *cestui que trust* was actually raised, although the settlement was voluntary, it was not material that the fund had, by the effect of accident, got back to the settler, as if the trustee of stock should make the settler his executor. Now, the converse of this proposition must equally hold good, and that is our case.—It is like a late case before your Honor, where a legacy was given to a married woman by a will, and the husband was made executor, and received the legacy; and your Honor held, that he had not reduced it into possession, so as to prevent his wife's right by survivorship. And why? Because he had received it as executor, and not in his marital right. The characters were totally distinct. That decision must govern our case.

Sir Samuel Romilly and Mr. Raithby for the defendants:—

To hold the will to be an execution of the power would be to overrule all the cases on residuary bequests. The case of Madison v. Andrew decides nothing more than that where a man has a general power of appointment, the fund shall be subject to his debts, which has long been the law of this Court. [Master of the Rolls.—But there, as in this case, the estate was settled subject to the power.] At any rate that case is not now an authority. As to the codicil, it is said, that the defect may be supplied; and so it may in common cases, but here it cannot be looked at, as it is not attested; because, here no intention appears to execute the power on the face of the instrument. A clear intention must appear, before the Court can aid the defect. The codicil is against the plaintiff. It shows that he forgot there

was any power. He thought, in default of issue, the property would revert to him. And, if he forgot his power, the Court cannot hold that this will pass under a bequest of property. The plaintiff admits that the will of itself would not be an execution of the power, and the codicil amounts to nothing; for this is the case of a non-execution, and not of a defective execution. As to the point upon the settlement being voluntary, if it be correct, it cannot be acted upon in this case, because the plaintiff states the settlement, and grounds her title upon it. The question is not made by the bill, and cannot now be gone into, even admitting that the law is as stated; whereas, here the fund is actually assigned, and the defendants do not require the assistance of the Court to defend their title.

Mr. Richards in reply :—

The limitation to the Earl of Cadogan was merely voluntary; it was a mark of respect to him; but, in point of law, he was a mere stranger. He could not have required a subpoena against our trustees. And, in fact, the defendants are asking relief, as they want to retain the fund, although they are bound to re-assign it in their character of mortgagors. [Master of the Rolls: Lord Cadogan could not have come here, requiring Mr. Cadogan to give him a better security for the money. But here did Lord C. stand in need of any other aid? The assignment was as good an assignment as could be made of this reversionary interest. You may be a trustee for a volunteer.] Upon the will and codicil taken together, there can be no doubt but that this power was duly executed. The words in the codicil admit of no other meaning than that the property was given to his wife by his will.

Master of the Rolls having taken time to consider :—

Two points were made on the part of the plaintiff; 1st, that it was necessary that the husband should execute the power. But, 2dly, if it was, that his will did amount to an execution of it. As to the first, it was said that the gift to Lord Cadogan was merely voluntary, and Lord C. could not have had any assistance from this Court: that the question is the same as if the representatives were parties seeking relief, as the circumstance of his executors having the money makes no difference, and I think that that circumstance is immaterial. But, as against the party himself, and his representatives, a voluntary settlement is binding. The Court will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees: Mr. W. Cadogan had an

equitable reversionary interest in that fund, and he has assigned it to certain trustees, and then the first trustees are trustees for his assigns, and they may come here, for when the trust is created no consideration is essential, and the Court will execute it though voluntary.

Then the question is as to the power. The will, it was hardly contended, although attested, would amount to an execution of the power. The circumstance of the attestation has been held not to be material, and it is now settled that a general disposition will not include property over which the party has only a power, unless an intention appear. But it is said, here is a codicil which will amount to an execution. For this no authority was cited; and I am not aware that the conception of the testator, of his power over his property, is ever referred to, except for the purpose of election. But here the question is upon an execution of a power. This point, however, is immaterial, as the codicil does not establish the testator's intention; he uses expressions descriptive only of the interests which his mother's settlement gave him in the fund, but that does not show that he meant to exercise the power. It is quite evident that he had not forgot his power. Here he remembered the settlement, and states that he had an absolute power over the 1,000*l*. The request is not evidence that he might not consider that Lord C. would not, in some event, become entitled to the property. But here he meant only that the money should be deducted out of the 1,000*l*. The codicil does not show that he considered all the property was his, which is necessary; and I should conclude the contrary. The bill must be dismissed as to this fund.

No. XXV.

Bury v. Bury (k), Ch. 11th July 1748.

Sir Thomas Bury being seised of a freehold estate, and also possessed of a leasehold estate, on the marriage of his son, Thomas Bury, by lease and release, 3d and 4th January 1725, settled the freehold estate on himself for life; remainder to his wife for life; remainder to Thomas, his son, for life; remainder to his intended wife for life; remainder to his first and other sons in tail male, with remainder to plaintiff for life, with

(k) *Vide supra*, p. 743. 756.

remainder to his first and other sons in tail male ; with remainder over : and the leasehold premises were assigned to trustees, to raise money to renew the lease, then to pay the rents to Thomas, the son, for his life ; remainder to his intended wife for her life ; remainder to his first and other sons ; remainder to the trustees, to pay the rents to plaintiff for his life ; remainder to his first and other sons, with remainder over.

The marriage took effect ; the wife died without leaving any issue male. Sir Thomas died.

Thomas Bury, on his second marriage with the defendant, having renewed the lease, by indenture, dated 31st Dec. 1736, settled the leasehold premises to himself for life, remainder to his second wife, the defendant, for life, with remainders over ; and therein taking notice, that the said *Thomas Bury was seised for the term of his natural life with the power of jointuring* in the said freehold lands, did, for enlarging the jointure, grant the same to her, for life, with remainders over.

The marriage took effect ; Thomas Bury died without leaving any issue male, either by his first or second wife ; so that the plaintiff became entitled to the leasehold premises, by virtue of the settlement made on Thomas Bury's first marriage. The bill was brought against the second wife for an account of the rents and profits of the leasehold premises, and to have all deeds and writings relating thereto delivered up.

The defendant denied that she had any notice of the deeds 3d and 4th Jan. 1725, or that there was any settlement of the leasehold premises, or that any such deed was delivered to her with the rest of the writings. There was only one witness who had proved he had been employed to look over the title for Thomas Bury and defendant ; and that amongst the papers he had seen a foul draft of the former settlement, and that there was no power of jointuring in the leasehold premises, which he told Thomas Bury of.

Lord Chancellor.—There are two questions : 1st, Whether she had notice ? 2dly, if no notice, Whether she can protect herself under the lease renewed by her husband ?

As to the 1st, there is no positive evidence of notice : she denied it by her answer, and there being only one witness against that answer, a decree cannot be made upon that one witness's testimony. Where an agent has been employed for a person in part, and not throughout, yet that affects the person with notice : here the recital in the deed of the power of jointuring was suf-

cient to have made defendant have inquired into it, and therefore shall affect her. In *Le Neve v. Le Neve* she admitted Norton was her agent; and so that differs from this case.

As to the 2d, There was no surrender of the former lease, for the legal estate was in trustees, and therefore the Court is to judge only as between *cestui que trusts*; and though the lease was renewed by T. Bury, yet it must follow the trust of the whole term, and he can have no contribution for what he paid, for he enjoyed it during his life. If a lease or deed is wrongfully given up or destroyed, you may give evidence of the purport of the deed, or have a discovery from the granters.—Decreed, that no alteration was made in the former trusts by Thomas's renewal of the lease.



INDEX.

In order to avoid repetition, the points have been arranged under the heads to which they appeared principally to belong, and references have been made to the principal heads from every other title to which it was thought a reader would refer for any particular point. To give an instance, under the head, *Bankruptcy, Act of*, the reader is referred to "Notice," where he will find, whether or not an act of bankruptcy is notice to a purchaser.

ABSTRACTS,

	Page
what should be attended to in examining them	- 9, n.
if the abstract be not ready at the day, the vendor cannot enforce the contract at law	- 365
but if the purchaser do not call for the abstract in sufficient time to complete, or receive it after the day fixed, equity will relieve the vendor	- 366
must be furnished by the vendor, at his own expense	- 385
should mention every incumbrance	- ib.
is considered complete, when	- ib.
for what purposes delivered	- ib.
to whom the property of it belongs	- 386
purchaser may maintain trover for it, pending the contract, if retained by the seller	- ib.

See TIME.

ACRES,

what shall be deemed customary, and what statute - 300, 301

ACT OF PARLIMENT. See NOTICE.

ACT OF BANKRUPTCY. See BANKRUPTCY, act of.

ACTION,

a party entitled to recover a penalty, where	- 204
may be brought by a purchaser for breach of contract, where	- 205

ADVANCEMENT—*(continued.)*

Page

so a declaration of trust, or devise by the father, subsequently to the conveyance - - -	634
but if a conveyance to a son is for a particular purpose, a trust will result to the father -	ib.
or the child may be put to his election -	ib.
purchase by a father in the joint names of himself and child, although an advancement, is not so strong a case as the other, qu. - - - - -	ib.
where the father is dead, a purchase by the grandfather in the name of the grandchild is an advancement -	636
purchase by a husband in the name of his wife is an ad- vancement - - - - -	ib.
purchase by a father, in the name of his wife or child, is voidable by creditors, where - - - -	636, 637
See EVIDENCE. PURCHASER. RESULTING TRUST.	

ADVOWSON,

statement in the particulars of, that a voidance was likely to occur soon, not binding - - - - -	4
---	---

AGENT,

the extent of his authority - - - - -	41
cannot buy the estate of his principal - - - - -	595
employed by parol to buy an estate, and paying all the mo- ney, cannot be compelled to convey it to his principal -	629
but if he deny the agreement, the principal is a com- petent witness to prove the perjury - - - -	ib.
who is a sufficient agent within the statute of frauds -	96. 100
estates bought by an agent with his principal's money may be followed, where - - - - -	638
purchaser must not pay money to the agent of the vendor before the time appointed - - - - -	41
his authority may be revoked, when - - - -	98
effect of his evidence against his signature as agent -	ib.
must be a third person - - - - -	100
payment of deposit by an agent for a purchaser, may be recovered by the latter, where - - - - -	221
See ATTORNEY. AUCTIONER. EVIDENCE. NOTICE.	

AGREEMENTS,

will be enforced in equity, against the heir at law of a vendor - - - -	182
--	-----

AGREEMENTS—(continued.)

Page

will be enforced in equity, &c.

but whether this will be done during the mino-

rity of the heir, qu. - - - - 183

against equitable issue in tail, where there has been

a decree in the ancestor's life-time, semble - 185

a widow entitled to free bench, where - - - 187

the survivor of joint tenants, where - - - ib.

a husband who has covenanted to sell his wife's

estate, where - - - - 188

a person becoming lunatic after the contract, where 191

a person entitled, in default of execution of a

power of sale, where a legal contract has been

made under the power, and the power is extin-

guished by the deaths of parties - - - 191

although the agreement is by parol, where, and where

not - - - - 103. 122

the vendor or vendee become bankrupt - - 162

the vendor or vendee be dead - - - 163

the purchaser is a nominal contractor, where, and

where not - - - - 200

void at law, where, and where not - - 202, 203

a penalty be imposed - - - - 204

the estate is destroyed, where - - - 254, 255

the consideration, being contingent, has failed,

where - - - - 257, 258

the vendor has not the interest which he pretended

to sell, or a title to the whole estate, where, and

where not - - - - 264. 278

the purchaser knew that the seller could not grant

the whole interest sold, semble - - - 281

the estate is freehold, and was sold as copyhold,

where - - - - 275

the estate be defective, where, and where not - 283

will not be enforced in equity

against issue in tail, where no fine or recovery - - 185

a widow entitled to dower - - - - 187

a feme covert - - - - ib.

where an agent has sold the estate in a manner not autho-

rized by his authority - - - - 196

an agent has committed a gross breach of trust to

his principal in the sale - - - - ib.

AGREEMENTS—(continued).

Page

will not be enforced in equity, &c.

so of a trustee - - - - -	197
when made in a state of intoxication - - - - -	193
where the seller has turned the purchaser out of pos- session given according to the contract - - - - -	ib.
where it would be particularly hard on the party against whom it should be decreed - - - - -	194
there has been <i>suppressio veri</i> , or <i>suggestio falsi</i> - - - - -	ib.
there has been a surprise - - - - -	195
a vendor has industriously concealed a patent defect - - - - -	2, 293
or not disclosed a latent defect - - - - -	2, 288
or was not <i>bond fide</i> owner of the estate at the time of the contract - - - - -	197
or although a <i>bond fide</i> contractor, yet can- not make a title - - - - -	198
the remedy is not mutual - - - - -	280
the purchaser can obtain only an undivided part of the estate contracted for - - - - -	274
the estate is leasehold or copyhold, and the pur- chaser contracted for freehold - - - - -	275, 276
general rules by which equity is guided in granting a specific performance - - - - -	191
to purchase and settle an estate, what is a performance - - - - -	640
to grant a lease, where binding on a purchaser - - - - -	734, 735
to provide a purchaser for an estate, how performed - - - - -	47
in the hands of one party may be obtained by the other to stamp it - - - - -	227
where there is only one part of the agreement executed, it must be produced on an action - - - - -	ib.

See CONSIDERATION. COVENANTS. PUR-
CHASER. STATUTE OF FRAUDS. TIME.
TITLE. VENDOR. VOLUNTARY CONVEY-
ANCE.

ALIEN,

can only purchase for the benefit of the king - - - - -	596
unless he be made a denizen - - - - -	ib.

AMBIGUITIES,

may be explained by parol evidence, where, and where not - - - - -	143, 161
---	----------

ATTESTED COPIES—(continued.)

Page

what attested copies must be furnished to the purchaser	
by the vendor - - - - -	467
semble, that an agreement to produce the title-deeds will	
not bar the purchaser of his claim to attested copies -	ib.
vendor must, at his own expense, furnish the purchaser	
with a covenant to produce the deeds - - - - -	467
and a purchaser is entitled to see the deeds -	387. 467
purchaser obtaining possession of the deeds, may	
retain them, where - - - - -	467
purchaser will be obliged to take copies if the deeds	
are lost, where - - - - -	ib.

ATTORNEY,

if an attorney sell an incumbered estate without disclosing	
the incumbrance, he is responsible to the purchaser -	6, 7
the vendor's attorney should not be employed by the pur-	
chaser - - - - -	7
should attend to what, in examining abstracts -	9, n.
bidding beyond his authority will himself be liable -	40
but not unless he be limited as to price - - - - -	ib.
has what remedy where the principal denies the authority	41
buying in an estate without authority is personally bound -	66
cannot buy from his client whilst the relation subsists -	602
but he is not incapable of contracting with his client, 610, 611	
how he should execute an agreement for sale of the prin-	
cipal's estate - - - - -	47
is answerable to his client in case of neglect - - - - -	486
purchaser not bound to take a conveyance executed by	
attorney - - - - -	389
vendor not compellable to execute by attorney - - - - -	ib.
to a commission of bankruptcy cannot purchase the bank-	
rupt's estate - - - - -	599

See AGENT. EVIDENCE.

AUCTIONEER,

ought not to prepare particulars of sale - - - - -	12
may deduct auction duty out of money received, or,	
otherwise, recover it by action - - - - -	15
must pay the duty himself if he undertake to give proper	
notices, &c. and neglect it - - - - -	17, 18
may demand payment of the duty from the purchaser,	
where payable by him - - - - -	39

AUCTIONEER—(continued.)

Page

cannot give credit for the purchase-money	-	-	-	41
should keep the deposit till the contract be completed	-	-	-	42
an action will lie against him for recovery of the deposit	-	-	-	ib.
so, for damages on breach of contract, unless he dis-				
close the name of his principal	-	-	-	43
may file a bill of interpleader, and pray an injunction, if				
both parties claim the deposit	-	-	-	42
is not, generally, liable to pay interest on a deposit	-	-	-	512
if interest is recovered from him, and he is not in fault, he				
may recover from the vendor	-	-	-	513
is not liable to expenses of investigating title	-	-	-	225
is not entitled to compensation for his services, if he omit				
usual clauses in the conditions of sale, whereby the sale				
is defeated	-	-	-	43
is an agent for the vendor and purchaser within the statute				
of frauds	-	-	-	98
although the purchaser bid by an agent	-	-	-	100
cannot buy the estate himself	-	-	-	600

See AUCTION. AUCTION DUTY. BIDDING.

DAMAGES. DEPOSIT. INTEREST.

AUCTION DUTY,

of seven pence in the pound is payable in respect of monies				
produced by sale of estates by auction	-	-	-	13
not payable in respect of what estates	-	-	-	13, 14
not payable if estate be bought in, by, or by the order of				
the vendor	-	-	-	16
or by, or by the order of his agent	-	-	-	ib.
but proper notices must be given	-	-	-	16, 18
payable although the sale is not by regular auction	-	-	-	16
whenever the highest bidder is to be the purchaser,				16, 17
will be allowed, if the vendor's title prove bad	-	-	-	20
and the purchaser can recover the duty he has paid from				
the vendor, if the title be bad	-	-	-	39
vendor may stipulate that the duty shall be paid by the				
purchaser	-	-	-	ib.
payment of duty, not a part performance of a parol agree-				
ment	-	-	-	116
where purchaser will be compelled to pay interest upon it,				507

See AUCTIONEER. BIDDING. CONDITIONS
OF SALE.

AUCTION,

Page

- Dutch, how conducted - - - - - 22, n.
 estate advertised to be sold by auction, should not be sold
 by private contract, without sufficient notice can be
 given to the public - - - - - 40
 putting up an estate by auction, will not charge assignees
 of a bankrupt as owners of it - - - - - 46
 sales of estates by auction are within the statute of frauds 101
contra of goods, *semble* - - - - - ib.

See ASSIGNEES OF BANKRUPTS. CONDI-
 TIONS OF SALE. DEPOSIT.

BANKRUPT,

- purchase by, in the name of a wife or child, is within the
 statute of James - - - - - 636, 637

See AGREEMENTS. ASSIGNEES OF BANK-
 RUPTS. COMMISSIONERS OF BANKRUPTS.
 COVENANTS. JUDGMENTS. TITLE.

BANKRUPTCY, ACT OF,

- will not discharge a contract for sale - - - - - 162
 nor an action for breach of covenant for title - - - 593
 will prevent the execution of an agreement if no commis-
 sion is issued - - - - - 163. 316
 will affect a purchaser, where - - - - - 672. 679

See NOTICE. ASSIGNEES OF BANKRUPTS.

BANKRUPTCY, COMMISSION OF. See ATTORNEY. NOTICE.

BANKRUPT, ASSIGNEES OF. See ASSIGNEES OF BANKRUPTS.

BANKRUPTS, COMMISSIONERS OF. See COMMISSIONERS OF
 BANKRUPTS.

BARON AND FEME,

- estates purchased by husband with the wife's separate
 money, may be followed, where - - - - - 638
 what is a good consideration for a settlement on a
 wife - - - - - 651. 656, 657
 purchase by a trader for his wife, where fraudulent against
 creditors - - - - - 636, 637
 husband must perform the marriage agreement before he
 can claim the benefit of it - - - - - 757
 purchaser of the consideration for the settlement by
 the wife is bound also - - - - - 758

See AGREEMENTS. ADVANCEMENTS.

BIDDING,

- dumb bidding is within the auction-duty acts - - - 17, 18

COMMISSION OF BANKRUPTCY,

Page

- if superseded, a purchaser's deposit will be returned on
 petition - - - - - 67
 not superseded even for fraud, where there are purchasers
 under it - - - - - 724

COMPENSATION,

- an agreement will be decreed to be performed *pro tanto*
 with a compensation, in what cases - - - 264. 277
 a right of sporting reserved over an estate not a subject
 for - - - - - ib.
 purchaser entitled to, for a deficiency in quantity, in what
 cases - - - - - 295
 bill for, will not lie after consignment money paid - - 499

CONCEALMENT,

- where it amounts to a fraud - - - 195. 248. 290. 497

CONDITIONS OF SALE,

- cannot be verbally contradicted - - - - - 28
 although the purchaser bind himself to abide by the
 declarations made at the sale - - - - - ib.
 unless the purchaser have personal information given
 to him - - - - - 29
 how construed - - - - - 27
 pasted up in sight, will bind a purchaser, where - - 29
 what provisions should be inserted therein - - 27, 39

See AUCTION. AUCTIONEER. AUCTION DUTY.

BIDDING. MISTAKE.

CONFIRMATION,

- of purchases by trustees or agents before the master, in
 what cases - - - - - 599

CONSIDERATION,

- unreasonable, no ground to refuse the aid of equity - 241
 inadequate, where a bar to the aid of the court, and where
 not, when the contract is executory - - - 242. 244
 inadequate, a ground of relief when the conveyance is
 executed, in what cases - - - - - 245
 inadequate, is a ground for relief, where the vendor is an
 heir, selling an expectancy - - - - - 246
 the rule as to the consideration on sale of reversions does
 not extend to a sale by auction - - - - - 257
 nor to a sale by tenant for life and remainder-man - 258
 contingent, agreed for, the estate belongs to the purchaser,
 although the consideration fails before the conveyance - ib.

CONSIDERATION—(continued.)

Page

what is deemed valuable to support a settlement against a	
subsequent purchaser	- 651
price fixed by a referee, good, where	- 252
agreed to be fixed by valuation generally will be enforced,	
although no valuation be made	- ib.
but where particular persons are appointed, the agree-	
ment is void, unless they act	- 253
and equity cannot relieve, although one of the	
parties die before the award	- ib.
how payment thereof must be pleaded	- 768

See AGREEMENT. ANNUITY. PURCHASER.

MARRIAGE CONSIDERATION. VOLUN-
TARY CONVEYANCE.**CONSTRUCTION OF THE PARTIES,**

not admissible to explain an instrument	- 147
---	-------

CONTINGENT REMAINDERS,

destruction of, discountenanced by equity	- 328
but title depending on, good	- ib.

CONTRACT,

the equitable consequences of it	- 162. 182. 254. 261
for sale of an estate, converts it into personalty in equity	177
although the election to purchase rests with the pur-	
chaser	- ib.
unless a title cannot be made, or equity will not	
perform the contract	- 179, 180
when deemed complete	- 180, 181

See PURCHASER. DEVISE.

CONVEYANCE,

it should be stipulated on a sale, that the conveyance shall	
be prepared by and at the expence of the purchaser	35. 232
must be prepared and tendered by the purchaser, although	
not bound to prepare it by the agreement, <i>semble</i>	232. 386
but although required to prepare the conveyance,	
need not do so if title is bad	- 233
the expense attending the execution of the conveyance	
falls on the vendor	- 388
if the estate be copyhold, the purchaser must pay for	
both surrender and admission	- ib.
the vendor is not bound to pay the fine although he	
covenant to surrender and assure the copyholds at	
his own expense	- ib.

CONVEYANCE—(continued.)

Page

the vendor must <i>himself</i> execute the conveyance or	
surrender the copyhold - - - - -	388
the vendor is not compellable to convey by attorney	389
of an estate in a register county should be registered	
immediately - - - - -	ib.
purchaser will be relieved against a defective convey-	
ance, where - - - - -	728

See TERMS OF YEARS.

COPYHOLDS,

contracted for, devisable before surrender - - -	165
pass under a general devise, if surrendered, although	
bought after the will which is not republished - -	173
sold as freehold, cannot be forced on a purchaser - -	275
sold with a stipulation to avoid the sale, if they prove free-	
hold, must be proved to be copyhold - - - - -	ib.
the contents of the court rolls not notice - - -	759

See CONVEYANCE.

CORPORATIONS,

cannot purchase for their own benefit without license -	596
sealing by them is equivalent to <i>signing</i> and sealing -	698

COSTS,

by whom payable in equity - - - - -	519
-------------------------------------	-----

COVENANTS,

in an agreement for purchase, are construed dependent -	229
to purchase and settle an estate, what amounts to a per-	
formance of it - - - - -	640
not a specific lien on the covenantor's lands - - -	643
in a lease, enure to the benefit of a purchaser - - -	237

COVENANTS FOR TITLE,

purchaser is entitled to what - - - - -	470. 475
run with the land, where, and where not - - -	570. 574
<i>general</i> , do not extend to <i>tortious</i> evictions - - -	575
unless the wrong-doer is named in the covenant - -	576
or the covenantor himself is the wrong-doer - - -	ib.
or the covenant is against all <i>pretending</i> to claim -	577
will not be restrained on slight grounds - - -	583
may, on the ground of mistake, be rectified in equity	592
covenant for right to convey, extends to the capacity of	
the grantor - - - - -	578
<i>limited</i> , how construed - - - - -	578. 582
<i>restrictive words</i> in the first of several covenants, having	
the same object, extend to them all - - - - -	584

COVENANTS FOR TITLE—(*continued.*)

Page

but where the first covenant is unlimited, it will not, in general, be restrained by a subsequent limited covenant - - - - -	589
nor will a preceding general covenant enlarge a sub- sequent limited covenant - - - - -	590
and where the covenants concern different things, they will not be controlled by restrictive words added to one - - - - -	591
purchaser is entitled to what remedy under covenants for title - - - - -	592
action for breach of, does not lie against devisee, under the statute of fraudulent devises - - - - -	593

CREDITORS,

consulted as to the mode of sale, cannot buy the property themselves - - - - -	600
guilty of laches, cannot follow specific legacy in the hands of a purchaser - - - - -	730

See ADVANCEMENT. PURCHASE MONEY.
TRUSTEES.

CROSS BILL,

where dispensed with - - - - -	217
--------------------------------	-----

CROWN DEBTS,

whether a purchaser can protect himself against them by a prior legal term - - - - -	449
simple contract crown debts do not bind a <i>bonâ fide</i> pur- chaser without notice - - - - -	ib. n.
of protection from, under 1 and 2 Geo. IV. c. 121 - - - - -	721

DAMAGES,

nominal only, can be recovered for breach of contract, where the vendor cannot, without fraud, make a title - - - - -	222
so even where an auctioneer sells an estate, after his authority has expired, and the principal will not perform the contract - - - - -	ib.
<i>sed qu.</i> as a general rule - - - - -	ib.

DECLARATION OF USES. See FINES.

DECREES OF EQUITY,

obtained by fraud, relieved against - - - - -	51. 731.
---	----------

See NOTICE.

DEFECTIVE CONVEYANCE. See CONVEYANCE.

DEFECTIVE EXECUTION. See POWER.

DEMURRER,

lies to a bill for a specific performance against distinct purchasers - - - - -	216
--	-----

DENIZEN. See **ALIEN.**

Page

DEPOSIT,

should be retained by the auctioneer till the contract is completed	43
if ordered to be paid into court, it will be after deducting the auctioneer's expenses	ib.
is a part payment	44
lost by the insolvency of the auctioneer, who shall bear the loss	ib.
purchaser may forfeit his deposit, and abandon the contract, where	65
an investment of a deposit in the funds will be binding on a vendor or purchaser, where	44
if a vendor accept less than the deposit, he cannot afterwards object to it	45
purchaser will be relieved against a forfeiture, where	ib.
if a purchaser's bill for specific performance be dismissed, the court cannot order the deposit to be returned	46

See **ACTION. AUCTIONEER. INTEREST.**

SALES BEFORE A MASTER.

DESCRIPTION OF AN ESTATE,

false	285
-------	-----

DEVISEE,

of an estate contracted for, not entitled to the estate, or the purchase money, if a title cannot be made	179
<i>contra</i> , if an estate, not contracted for, is by a will directed to be bought	181
not liable to an action of covenant under the statute of fraudulent devises	593

DEVISE,

estates contracted for may be devised, whether freehold or copyhold	164
will pass by will, where	166
will not pass, where	ib.
of an estate under a contract for sale to be sold for a charity, valid	164
of an estate contracted to be sold, by a will made subsequent to the contract, gives what interest to the devisee	177
of a term is revoked by the purchase of the fee	167
of an equitable estate, not revoked by a subsequent conveyance to the devisor	166, 167

DEVISE—(continued.)**Page**

- unless to different uses - - - - - 170
- and then, although the contract was by parol - - - - - ib.
- revoked by a contract for sale - - - - - 173
- unless equity will not perform the contract, *semble* - 174
- where the agreement is abandoned, *qu.* - - - - - 175

See WILL.

DEVISE, EXECUTORY,

- its utmost limits - - - - - App. n. p. 814

DILAPIDATIONS,

- where purchaser entitled to allowance for - - - - - 519

DISCOVERY,

- purchaser will not be compelled to discover writings - 724

DISTRESS,

- lies for rent reserved upon a lease of freehold or leasehold, where there is a reversion - - - - - 237. n.

DOWER,

- a purchaser is entitled to a fine in respect of it, where,
 - and where not - - - - - 331
- not barred by a jointure made without the wife's privity - 335
- equitable bar of, what is - - - - - 338
- bar of dower no bar of thirds - - - - - ib.
- purchaser can protect himself against dower by a prior
 - legal term - - - - - 454
 - unless it was privately created just before marriage - 456
- wife joining in barring her dower, is a valuable consideration for a settlement on her - - - - - 657

EJECTMENT. See MORTGAGE.**ELECTION. See ADVANCEMENT. HEIR AT LAW.****ELEGIT,**

- leasehold estates may be extended on an - - - - - 689

EXTENT,

- sale under, where a good title cannot be made - - - - - 67

EQUITY,

- after a bill for specific performance is filed, the court will
 - enjoin either party not to do any act to the injury of the other - - - - - 205
- and agents to the parties, if such agents are parties to the
 - suit - - - - - 206
 - not otherwise - - - - - ib.
- will give a purchaser compensation for breach of the agreement, where - - - - - 218, 219

EQUITY—(continued.)

Page

protects purchasers *bonâ fide* and without notice - - 732

See SALES BEFORE A MASTER, and *passim*.

EQUITY OF REDEMPTION. See MORTGAGE.

ESCHEAT. See TERMS OF YEARS.

EVIDENCE, PAROL,

admissible, where :

to prove a consideration consistent with the deed - - 124

so, as a defence to a bill seeking a specific performance on

the ground of fraud, mistake or surprise - - - 128

or to explain latent ambiguities - - - 143

or the meaning of ancient instruments - - - 148

or to show what is parcel or not, of the thing conveyed - 143

or to explain a mistake, where, and where not - 149. 157

or on the ground of fraud - - - 159

or to correct a settlement made contrary to the intention

of the parties, merely to prevent a forfeiture - - 157

to prove a resulting trust - - - 625

even after the death of the nominal purchaser - 626

to rebut a resulting trust, or any equitable presumption - 628

not admissible, where :

to disannul or vary a written agreement - - - 125

nor to correct printed conditions of sale - - - 126

the rules are the same in equity - - - 127

not even as a defence to a specific performance, if the

agreement was, at the time, correctly reduced to writing 133

nor of collateral matters, although not mentioned in the

agreement - - - 133. 136

nor of the variation of an agreement - - - ib.

nor of the discharge of a written agreement, except as a

defence in equity - - - 137. 144

unless the parol agreement has been in part performed ib.

nor to explain a patent ambiguity - - - 144

as the meaning of a word in a deed - - - ib.

or act of parliament - - - 145

nor to restrain general words - - - 146

nor of the construction of the parties - - - 148

nor where parties have omitted a provision, deeming it

illegal - - - 157

EVIDENCE, PAROL—(continued.)

Page

- where a man purchases in the name of a stranger, the evidence to rebut the resulting trust lies on the nominal purchaser - - - - - 628
- contra*, where the purchase is in the name of a child principal is a good witness to prove the perjury of his agent, where - - - - - 629
- agent not a good witness against the principal - - 761
- what is sufficient evidence of notice in equity - - - ib.

See WITNESS.

EXECUTION. See JUDGMENTS.**EXECUTOR,**

- cannot mortgage the assets for his private debt - - 548
- his receipt is a discharge for the purchase money of leasehold estates - - - - - 545
- estates bought by an executor with the assets, cannot be followed, unless the trust appear on the deed, or the application of the money is clearly proved - - - 638

See PURCHASE MONEY.

EXPENSES,

- of investigating a title, &c. may be recovered where the vendor cannot make a title - - - - - 224

FALSE DESCRIPTION. See FRAUD. VALUE.**FATHER AND CHILD.** See ADVANCEMENT.**FELONS,**

- can purchase, but not hold - - - - - 596

See TERMS OF YEARS.

FEME COVERT,

- can only purchase *sub modo* - - - - - 597
- unless authorized by her husband - - - - - ib.
- is answerable in equity for a fraud - - - - - 726

FINES,

- terms of years barred by, where - - - - - 391

See COPYHOLDS. DOWER. POWER. TITLE.

FIRE,

- loss by, after the contract, must be borne by the purchaser 255
- contra*, where the estate is sold before a master, and the report is not absolutely confirmed - - - 256

FIXTURES,

- purchaser where entitled to - - - - - 34

FRAUD,		Page
	if persons, having a right to an estate, encourage a purchaser to buy it, they will be bound by the sale -	726
	if even a stranger make a false representation to a purchaser of value, &c. an action will lie against him -	5
	<i>mere suspicion</i> of, not notice to a purchaser -	326
	in a written agreement relieved against, according to parol evidence -	158

See CONCEALMENT. DOWER. EVIDENCE.

INCUMBRANCES. STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE,		
	settlement with general power of revocation, void against a purchaser -	668. 672
	See VOLUNTARY CONVEYANCE.	

GOODS. See LEASEHOLD ESTATES.

GRANDFATHER AND GRANDCHILD. See ADVANCEMENT.

GUARDIAN,		
	cannot purchase his ward's estate on his coming of age, <i>semble</i> -	606

HEIR,		
	relieved against a sale, for an inadequate consideration -	246

HEIR AT LAW,		
	bound by his ancestor's contract, although he die before the time limited for completing it -	162
	unless the devisee permit the heir to take the estate for a long time -	168
	what should be attended to in purchasing an estate of an heir at law, conveyed or surrendered to his ancestor after his will -	172
	will be entitled to lands contracted for by his ancestor, where -	170. 180
	wrongfully applying the personal estate in paying the purchase-money, gives the persons entitled a charge on the land -	171
	may be put to his election, although the testator had not the estates at the time of his will -	172
	whether an infant heir at law will be deemed a trustee within the 7 Anne for a purchaser, under a contract by the ancestor -	182

INTEREST—*(continued.)*

	Page
on timber, runs only from the valuation - - - -	507
must be paid by a purchaser of a reversion, from what time - - - - -	501. 507
must be paid by a purchaser of a leasehold estate, although he has not received the rents, and the vendor must pay a rent for the estate - - - - -	509
must be paid in respect of a sum deposited with a purchaser to pay off incumbrances - - - - -	511
an agreement to pay interest, although signed by the vendor only, will bind, where - - - - -	509
a purchaser never pays interest on the deposit - - -	511
can be recovered ¹ by a purchaser on a deposit paid either to a principal, or to an auctioneer - - - - -	222. 513
is not recoverable against an auctioneer, unless under particular circumstances - - - - -	512
if recovered against an auctioneer he may recover it from the vendor - - - - -	513
whether it can be recovered in an action for money had and received, qu. - - - - -	224
must be paid by a vendor where he cannot make a title, if the purchase money has lain dead - - - - -	513
so by a person opening biddings - - - - -	514
must be allowed to a trustee where a purchase by him of trust property is set aside - - - - -	515
an agreement by a purchaser to pay a rent exceeding legal interest is not usurious, where - - - - -	ib.
what rate of interest is payable - - - - -	516, 517

See **LESSEE.**

JOINT PURCHASERS,

their rights and liabilities - - - - -	617
--	-----

JOINT TENANCY. See AGREEMENTS.**JOINTURE. See DOWER.****JUDGMENTS,**

should be searched for - - - - -	476
entered up after the purchase money is paid will not bind in equity - - - - -	ib.
against bankrupts are reduced to a level with simple contract debts, in what cases - - - - -	686
bind an equity of redemption in the hands of a purchaser with notice - - - - -	478

JUDGMENTS—*(continued.)*

Page

qu. as to a trust estate - - - - -	479
bind after-purchased estates - - - - -	482
do not bind leasehold estates till when - - -	482. 688
do not affect an equity of redemption of a term -	483
do not bind real estates until entered and docketed	682
cannot be docketed after the time appointed by the act	684
in what cases they bind purchasers although not duly docketed - - - - -	685
may be defeated by a purchaser without notice, who has a prior legal estate - - - - -	478
where a purchaser shall have contribution in respect of execution - - - - -	483

See INCUMBRANCES. NOTICE. REGISTER.

LACHES. See TIME. TRUSTEES.

LAND TAX,

of protection from defects in sales for redemption of land tax - - - - -	713
--	-----

LEASE,

misrepresented, purchaser will be entitled to compensation, in what cases - - - - -	279
what is notice of, to a purchaser - - - - -	754
should be seen by a purchaser before he completes -	ib.
underlease will not be decreed under an agreement to assign	280
agreement to grant a, where binding on a purchaser	733, 734

See ASSIGNEES OF BANKRUPTS. COVENANTS.

PURCHASERS. REGISTER. TERMS
FOR YEARS.

LEASEHOLD ESTATES,

renewable, what is a sufficient title to - - - -	312
where assignments of, will be presumed - - -	ib.
may pass in a will under the word "goods" - -	691
but cannot pass in an assignment under that word -	ib. n.

SEE INCUMBRANCES. INTEREST. JUDGMENTS.

PURCHASER. TITLE. VENDOR.

LEGATEE. See MARSHALLING.

LESSEE,

purchasing, the tenancy is determined - - -	164
on conveyance of the inheritance, the covenants between him and the lessor are determined - - -	166

LESSEE—(continued.)

Page

with an option to purchase, rent ceases upon declaring the option, and interest runs - - - - -	509
his possession is notice of his title - - - - -	754
but not of the lessor's title - - - - -	755

LETTERS,

are agreements within the statute of frauds, where -	83
--	----

LIEN,

whether any exist for money received by vendor who is entitled to retain the estate by the death of the pur- chaser without heirs - - - - -	261
purchaser has a lien on the estate for money paid, if vendor cannot make a title - - - - -	551
purchaser has not a lien on the purchase money, in respect of a concealed incumbrance, after the money is appro- priated by the vendor - - - - -	499
vendor has a lien on the estate for purchase money un- paid - - - - -	551
even where the agreement provides for the security of the purchase money during the purchaser's life -	ib.
unless he be a papist incapable of purchasing -	552
or take a distinct security for the money -	ib.
but taking a bond or note will not discharge the lien - - - - -	554
the lien extends to whom - - - - -	559
prevails against whom - - - - -	566, 567
semble, that it cannot prevail against an equitable mortgage by deposit of title-deeds - - - - -	568

LIMITATION OF TIME. See STATUTE OF LIMITATIONS.**LIS PENDENS,**

the effect of it - - - - -	708. 745, 746, 747
----------------------------	--------------------

See NOTICE.

LOTS,

estate sold in, a distinct contract arises upon each -	270
purchaser of several lots will be compelled to take those to which a title can be made, in what cases -	268

See STAMPS.

LUNATICS,

can only purchase <i>sub modo</i> - - - - -	597
---	-----

See AGREEMENTS.

MARRIAGE CONSIDERATION,

Page

valuable - - - - - - - -	651
whether it extends to collaterals - - - -	652

MARSHALLING,

the vendor's lien, and the personal estate of the purchaser, will be marshalled in favour of a legatee, where, and where not - - - - - - - -	559
--	-----

**MASTER IN CHANCERY. See REFERENCE. SALES BEFORE
A MASTER.**

MEMORIAL,

of deeds to be registered must be executed in the presence of what witnesses - - - - - - - -	695
deeds cannot be re-executed for the purpose of registry, semble - - - - - - - -	696
sealed by a corporation is equivalent to signing and sealing	698
should contain what - - - - - - - -	ib.
of grants of life annuities - - - - - - - -	App. No. 12. p. 787

See REGISTER.

MERGER,

of terms for years in the fee - - - - - - - -	397
---	-----

MISTAKE,

if a person buy his own estate he will be relieved - - - - - - - -	238
a defence against a specific performance - - - - - - - -	128
in written instruments corrected by equity according to parol evidence, where and where not - - - - - - - -	149
not to the prejudice of a purchaser - - - - - - - -	161
of parties to a conveyance of their rights will not affect a purchaser - - - - - - - -	726
condition that mistakes shall not affect the sale, will only cover unintentional errors - - - - - - - -	37
mutual, equity will not assist either party - - - - - - - -	195
agreement will be presumed to be executed under a mis- take where the purchaser knew the seller could not make a title - - - - - - - -	281
of the seller as to the operation of his purchase no bar to a specific performance - - - - - - - -	284
of a party of the legal construction of words, immaterial - - - - - - - -	285

See EVIDENCE. SALES BEFORE A MASTER.

TITLE. WILL.

MORTGAGE,

Page

purchaser of an estate in mortgage makes his personal estate the primary fund for payment of it, where	- 179
so joint purchasers, where	- 620
must indemnify the vendor against the mortgage money	236
proceedings in ejectment will not be stopped, where mortgagee has agreed to purchase the estate	- ib.
equitable mortgage will prevail over a lien for purchase money, semble	- 567
deposit of title deeds, by a simple contract debtor of the crown, binds the crown as an equitable mortgage	- 568
purchaser of an equity of redemption should give notice of the sale to the mortgagee	- 705
purchaser of a mortgage should not buy without the privity of the mortgagor	- 705
purchase will be deemed a mortgage, where	- 240
power of sale in a mortgage without the assent of the mortgagor, is valid	- 331
possession without title will not give a right to redeem	- 357
mortgagee may purchase from the mortgagor	- 601

See AUCTION DUTY.

NE EXEAT REGNO,

lies against a purchaser for purchase money unpaid, where	234
---	-----

NOTICE,

of an act of bankruptcy deprives a purchaser of the benefit of the statute of James	- 673
what is not notice of an act of bankruptcy	- 674
of a judgment not duly docketed binds a purchaser	- 685
so of deeds not duly registered	- 706
but notice of an unregistered deed is unimportant at law	- 707
purchaser with notice is bound in the same manner as the person was of whom he purchased	- 732
unless his consent was necessary to the validity of the incumbrance	- 733
and a fine and non-claim will not improve his title	- 736
unless it is a mere legal title	- 737
to be binding must be had, when	- 738
purchaser without notice is not affected by notice in his vendor	- ib.

NOTICE—(continued.)

Page

purchaser with notice will not be effected if his vendor

bought without notice - - - - - 738

not material, as to notice, that the purchase was made

under the direction of the court - - - - - 742

infants are bound by - - - - - ib.

is either actual or constructive - - - - - 740

actual will not bind unless given by a person interested

in the property during the treaty - - - - - ib.

what is constructive notice :

notice to the counsel, agent, &c. of the purchaser 742

but it must be in the same transaction - - - 743

a public act of parliament - - - - - 744

lis pendens - - - - - 745

but not for the purpose of postponing a registered

deed - - - - - 743

what is not a sufficient *lis pendens* - - - - ib.

registration of deeds where the purchaser is not

seised of the legal estate before the purchase, qu. 748

whatever is sufficient to put a purchaser upon in-

quiry, as possession by a tenant, description in

a deed, &c. - - - - - 753

so notice of a judgment held notice of an equitable

mortgage - - - - - 754

what is not constructive notice :

a private act of parliament - - - - - 744

a public act of a private nature, *semble* - - - ib.

decrees of equity - - - - - 747

unless they are decrees to account - - - 748

an act of bankruptcy - - - - - 749

unless the purchaser claim the benefit of 46

Geo. III. - - - - - 675

a commission of bankruptcy - - - - - 749. 753

unless the purchaser claim the benefit of 46

Geo. III. - - - - - 675

docketing of judgments - - - - - 748

registration of deeds, where the purchaser is seised

of the legal estate before the purchase - - - 748

the vendor being out of possession - - - 756

mere suspicion of fraud - - - - - 758

the contents of court rolls - - - - - 759

witnessing of deeds - - - - - ib.

NOTICE—(continued.)

Page

equitable construction of words - - -	76
what is sufficient evidence of notice - - -	761
how denial of notice should be pleaded - - -	770

See JUDGMENTS. REGISTER. VOLUNTARY
CONVEYANCE.

OPINION,

on abstract, to whom it belongs - - -	386
of counsel approving the title, no waiver of reasonable ob- jections on the part of the person consulting him -	395

OPTION,

to purchase, its effect - - -	177, 178
-------------------------------	----------

PAPISTS,

who have not taken the proper oaths can only purchase <i>sub modo</i> - - -	598
but protestants may safely purchase of such papists, in what cases - - -	709, 711

See ADVANCEMENT. LIEN.

PARISHIONERS,

cannot purchase - - -	595
-----------------------	-----

PARLIAMENT, ACT OF. See NOTICE.**PAROL AGREEMENT,**

for a lease will bind a purchaser, where - - -	733
--	-----

See EVIDENCE. STATUTE OF FRAUDS.

PART PERFORMANCE. See STATUTE OF FRAUDS.**PARTIAL EXECUTION OF A CONTRACT,**

where it will be enforced - - -	264, 275
---------------------------------	----------

**PARTICULARS OF SALE. See AUCTIONEER. CONDITIONS
OF SALE. STATUTE OF FRAUDS.****PENALTY. See ACTION. AGREEMENTS.****PERFORMANCE,**

of an agreement to purchase and settle an estate -	64
--	----

PERJURY,

if a defendant deny a parol agreement, he may be tried for perjury - - -	10
and the plaintiff is a competent witness to prove the perjury	

PLEADING. See PURCHASE.**POSSESSION,**

the taking of, may be considered as a waiver of objections delivery of, in general a part performance of a parol agree- ment - - -	1
--	---

POSSESSION—(continued.)

Page

delivered to a purchaser, the effect of it - - - 233

may be determined - - - - - 234

where possession was delivered, but the fact of purchase

was disputed, an issue was directed - - - 123

See PURCHASER.

POWER,

reserved by purchaser, to appoint purchase-money, it is

still assets - - - - - 163

general power of revocation in a settlement makes it void

against a purchaser - - - - - 668

although the power is only conditional - - - 669

unless the condition be *bonâ fide* - - - ib.

or although the time of revocation has not arrived - 670

the power has been released - - - - - ib.

See MORTGAGE.

purchaser will be relieved against a defective execution of

a power - - - - - 725

unless the sale was not within the compass of the power ib.

PRE-EMPTION,

right of - - - - - 178, n.

PRETENDED TITLE,

a sale by a person entitled under an agreement before

an actual conveyance to him, is not within the statute

32 Hen. VIII. c. 9 - - - - - 494, 495

PRÆMUNIRE,

persons guilty of this offence, can purchase, but not hold - 596

PRESUMPTION,

legal estate will be presumed to have been conveyed,

where - - - - - 312. 324

PRINTED NAME,

a sufficient signature within the statute of frauds - - 93

PROFITS. See RENTS.**PUFFER. See BIDDING.****PURCHASE,**

how it should be pleaded - - - - - 766

for a valuable consideration, is a protection, in equity,

against legal as well as equitable estates, semble - 771

PURCHASER,

who cannot be - - - - - 595

cannot be relieved in respect of patent defects in an estate 283

but otherwise of latent defects of which the vendor

was aware - - - - - 2. 288

PURCHASER—(continued.)

	Page
should not trust to any statements of the vendor respect-	
ing value - - - - -	3
but may rely on a statement as to rent - - - - -	4
should not employ the vendor's attorney - - - - -	7
should not take possession of the estate where the title is	
doubtful - - - - -	10
but may take possession when contract is entered into	11
where a purchaser in possession of the estate will be or-	
dered to pay his purchase-money into court, and where	
not - - - - -	213
does not become tenant to the seller upon being let into	
possession - - - - -	233
such possession may be determined - - - - -	234
is not bound to acquaint a vendor with any latent advan-	
tage in the estate - - - - -	6
may misrepresent the seller's chance of sale - - - - -	ib.
having notice of a lease should see the covenants -	9. 754
what inquiry should be made, where an equitable right,	
not in possession, is purchased - - - - -	11
of a leasehold estate, must indemnify the vendor against	
the rent, &c. - - - - -	34. 236
not where the assignees of a bankrupt are vendors -	34
entering into possession, even with consent of the parties	
in a cause, will be compelled to pay the money into	
court - - - - -	50
of an equity of redemption must indemnify the vendor	
against the mortgage-money - - - - -	236
selling before actual conveyance entitled to indemnity	
from sub-purchaser against costs of proceedings for his	
benefit - - - - -	ib.
may sell or devise an estate contracted for before the	
conveyance - - - - -	164
must bear any loss happening to the estate by fire or	
otherwise, before the conveyance, and is entitled to any	
benefit accruing to it in the interim - - - - -	ib.
will be compelled to take a part of the estate, where	264. 276
of two sevenths of an estate allowed to rescind the con-	
tract, the title to one proving bad - - - - -	274
may insist upon a part performance, where - - - - -	277
will be relieved in respect of a defect in the quality or	
quantity of the estate, where and where not -	283. 299

PURCHASER—*(continued.)*

	Page
buying an interest which did not exist, relieved - -	239
may insist that the vendor's title shall be sifted - -	207
is entitled to what relief under covenants for title - -	592
of an heir at law or devisee not bound by specialty debts of the ancestor or testator - - - - -	525, n.
joint-purchasers will in equity take as tenants in common, where - - - - -	617. 620
where two persons purchase an estate, and one pays the money, he can only file a bill against the other for a con- tribution - - - - -	621
a purchase by two in the name of one, the trust may be proved how - - - - -	622
parol agreement by two, and the conveyance taken in the name of one, is taken out of the statute of frauds, where ib.	
taking a conveyance in the name of a stranger, the trust results to him - - - - -	624
taking a conveyance in the name of his child is an advance- ment - - - - -	630
without notice of an act of bankruptcy will not be affected by any commission of bankruptcy unless issued, when - - - - -	675. 679
buying an equity of redemption should immediately give notice to the mortgagee - - - - -	705
and should declare whether his personal estate shall or shall not as between his representatives be the primary fund for payment of the mortgage - - -	179
will be relieved and protected in equity, in what cases -	723
paying off prior incumbrances lets in a subsequent one of which he had notice - - - - -	731

See ACTION. AGENT. ADVANCEMENT. AGREEMENT. ATTESTED COPIES. AUCTIONEER. BIDDING. CHARITABLE USES. CHOSE IN ACTION. CONVEYANCE. CONSIDERATION. COVENANTS. DEPOSIT. DEVISE. FRAUD. IMPROVEMENTS. INCUMBRANCES. JUDGMENTS. LESSEE. MISTAKE. MORTGAGE. NE EXEAT REGNO. NOTICE. PAPISTS. POWER. PURCHASE MONEY. REGISTER. RECOVERIES. RESULTING TRUST. REVERSION. SALES BEFORE A MASTER. TERMS OF YEARS. TIME. TITLE TRUSTEES. VOLUNTARY CONVEYANCE.

PURCHASE MONEY,

Page

a deposit is part payment of	- - - - -	44
payment of, is not a part performance of a parol agree-		
ment, <i>semble</i>	- - - - -	110, 117
secured by a purchaser at a day certain, must be paid,		
although the seller break his agreement	- - - - -	230
purchaser is a trustee of, for the vendor, from the time of		
the contract	- - - - -	162
is always assets of the vendor	- - - - -	163
may be required to be paid into court, if the purchaser is		
in possession	- - - - -	56
where a purchaser in possession of the estate will, upon		
motion, be ordered to pay his purchase-money into court,		
and where not	- - - - -	213
where purchase-money is large, a long day will be al-		
lowed	- - - - -	215
under proper circumstances will be enlarged	- - - - -	ib.
may be retained or recovered by a purchaser in respect of		
incumbrances or defects in the title, where and where		
not	- - - - -	487, 488
purchaser has no lien on it, after it is appropriated, even		
in case of fraud	- - - - -	499
paid to a creditor having two securities, shall be taken in		
satisfaction of the security affecting the estate	- - - - -	500
equity in favour of creditors will prevent payment of pur-		
chase-money to an heir or devisee	- - - - -	525, n.
and in favour of simple contract creditors under 47 G. III.	- - - - -	ib.
purchaser must see to the application of purchase-money		
of <i>real</i> estates,		
where the trust is for payment of specified debts or le-		
gacies	- - - - -	527
the debts are ascertained by a decree	- - - - -	529
is not bound to do so,		
where the first or only trust is for payment of debts		
generally	- - - - -	528
the <i>cestuis que trust</i> are infants or unborn	- - - - -	529
the <i>cestuis que trust</i> are abroad, <i>semble</i>	- - - - -	539
the trusts require time and discretion	- - - - -	530
is not bound to ascertain the deficiency, although the		
trust be for payment of such debts as the personal		
estate shall be insufficient to pay	- - - - -	541

PURCHASE MONEY—(continued)

Page

but he is bound to do so where only a power is given	- 542
is equally bound, although there is only a charge of debts, &c.	- 532
may be discharged from seeing to the application, how	542
the receipts of what trustees will be discharges	- 543
purchaser of <i>leasehold</i> estates not bound to see to the application of the money	- 546
unless there be fraud, &c.	- 549
how payment of should be pleaded	- 768

See AGENT. LIEN.

QUALITY OF AN ESTATE,

false description of	- 283
----------------------	-------

QUANTITY OF AN ESTATE,

false description of	- 294
----------------------	-------

RECEIPTS FOR PURCHASE MONEY,

are agreements within the statute of frauds, where	- 80
by trustees are discharges, where	- 525
are conclusive, where	- 554, n.

RECOVERIES,

equitable, good, although the equitable tenant to the <i>præcipe</i> has the legal estate for life	- 343
purchaser may after twenty years produce the deed, making a tenant to the <i>præcipe</i> , as evidence that a recovery was duly suffered, although no record can be found thereof	- 712
where a purchaser is entitled to a recovery	- 329

See FINES.

REFERENCE TO A MASTER,

as to the title	- 206
general practice in making inquiries under	- 212

REGISTER,

title-deeds should be registered before a purchaser completes	- 484
what need not be registered	- 485
what cannot be registered	- 698
semble, that writs of execution on judgments intended to affect leasehold estates need not be registered	- 486
effect of registry and non-registry of wills within the period prescribed by the acts	- 693
of the execution, contents, &c. of the memorial	- 696
deeds should be registered immediately after their execution	389

REGISTER—(continued.)

Page

- deeds, &c. are void against a purchaser unless registered - 694
- deed of appointment under a power must be registered - 701
- registry of an assignment which recites a lease is not
 - a sufficient registry of the lease - - - - - ib.
 - of the exceptions in the acts - - - - - 701
- registry of deeds is not notice to a person seised of the
 - legal estate - - - - - 704
 - but it is notice to a person not seised of the legal
 - estate, semble - - - - - 705
- purchaser buying with notice of a prior incumbrance not
 - registered will be bound by it - - - - - 706
- . See INCUMBRANCES. MEMORIAL. NOTICE.

RELEASE,

- acceptance of, no admission of right - - - - - 737

RENTS,

- purchaser entitled to, from what time - - - - - 55. 501
- may be recovered by a purchaser, where - - - - - 237

REPAIRS. See ADVANCEMENT. IMPROVEMENT.**REPUBLICATION,**

- of a will, what amounts to - - - - - 171

RESULTING TRUST,

- purchaser taking a conveyance in the name of a stranger,
 - a trust results - - - - - 624
- but even a parol declaration will prevent a resulting trust 628
- See ADVANCEMENT, EVIDENCE.

REVERSION,

- qu. if a bill will lie against a purchaser of a reversion to
 - perpetuate testimony - - - - - 732
- See TIME. TITLE.

REVOCATION, POWER OF. See POWER,**ROMAN CATHOLICS. See PAPISTS.****SALES BEFORE A MASTER,**

- the advertisements are prepared, by whom - - - - - 49
- conducted, how - - - - - 50
- in a proper case the court will order a bidding to be
 - reserved - - - - - 49
- the purchaser must procure a report of his being the best
 - bidder - - - - - 52
 - is entitled to a conveyance, when - - - - - 54
 - the conveyance to be drawn, by whom - - - - - 56

SALES BEFORE A MASTER—(continued.)	Page
biddings will be opened, where - - -	59, 60. 63
practice with respect to opening biddings - - -	62
purchaser will be compelled to complete, when - - -	53
will be discharged, upon what terms - - -	51
will not be hurt by any irregularity in a decree -	ib.
may abandon the contract, and forfeit his deposit,	
where - - - - -	65
may be discharged from his contract, where he has,	
by mistake, given an unreasonable price for the	
estate - - - - -	ib.
purchaser is entitled to possession, from what time -	55
purchaser dying before the absolute confirmation of the	
report, the court will order a conveyance to his devisees	57
joint purchasers must pay their money together - -	55
incumbrance not appearing upon the report may be paid	
off, when - - - - -	54
estate directed to be sold before a master cannot be sold	
otherwise - - - - -	57
are not within the statute of frauds - - - -	58
although an agent's authority could not be proved,	
unless there be fraud - - - - -	ib.

See AUCTION. FIRE. INTEREST. TITLE.

SELLER. See VENDOR.

SIGNATURE. See CORPORATION. STATUTE OF FRAUDS.

SLANDER OF TITLE - - - - - 741

SOLICITOR. See ATTORNEY.

SPECIFIC PERFORMANCE. See AGREEMENTS.

STAMPS,

either party may obtain the agreement from the other to	
stamp it - - - - -	227

STATUTE OF FRAUDS,

no action can be brought upon any contract for sale of	
lands unless in writing, and signed by the person to be	
charged - - - - -	68
whether a license is within the act - - - -	73
agreement by tenant, in consideration of improvements by	
landlord, to pay an additional sum per annum, is not	
within the statute - - - - -	75

STATUTE OF FRAUDS—(continued.)

Page

an agreement for an assignment is within the act	-	-	75
so is a sale of a standing crop of grass	-	-	76
but timber growing upon the land is not	-	-	ib.
nor potatoes in the ground to be taken immediately,	76,	77	
want of the signature to the agreement of the party seeking			
to enforce it, fraud, where	-	-	79
agreement void as to part is void <i>in toto</i>	-	-	78
the signature of the party to be charged is sufficient	-		79
a letter or a receipt is a sufficient writing	-	-	80
but it must be stamped	-	-	ib.
and prove the agreement set up	-	-	87
and it must specify all the terms	-	-	82
for the most trifling omission will be fatal	-	-	84
but if it refers to a writing which contains the			
whole agreement, although not signed, that is			
sufficient	-	-	85
whether an entry by an auctioneer in his books will do	-		87
a letter written to a third person, containing directions to			
execute the agreement, will do	-	-	88
rent rolls, &c. will not be deemed an agreement although			
signed	-	-	90
the sending a sufficient agreement as instruction to prepare			
a technical agreement is immaterial	-	-	91
what is a sufficient signature	-	-	92. 95
agent may be authorized to contract by parol	-	-	96
but his clerk cannot act without a special authority	-		98
an auctioneer is an agent for both parties within the			
statute	-	-	ib.
sales by auction of estates are within the statute	-	-	101
<i>contra</i> of goods, semble	-	-	ib.
sales before a master not within the statute	-	-	102
or under the authority of the court	-	-	ib.
or where the agreement is confessed by the answer	-		ib.
unless the defendant plead the statute	-	-	104
which he cannot do by an answer to an amended			
bill, where he has admitted the agreement by			
his original answer	-	-	106
sales not within the statute where it would protect fraud,			
as where the agreement is express to reduce the			
contract into writing, and it is prevented by fraud,	107		

STATUTE OF FRAUDS—(continued.)

	Page
or an agreement partly performed	107
delivery of possession is in general a part per-	
formance	108
whether where two are in treaty for an estate, and	
one desists, qu.	622
but ancillary acts are not	107
where the payment of additional rent by tenant in	
possession, or expending money by him on the	
estate, will take an agreement for renewal out of	
the statute	109
acts done to the defendant's own prejudice not part	
performance	117
nor payment of purchase money, semble	110
auction duty	117
part performance as to one lot does not extend to	
other lots sold under distinct particulars	ib.
where the agreement is in part performed, the court	
will endeavour to ascertain the terms	118. 123
resulting trusts are exempted out of the statute	624
the tenth section only extends to clear and simple trusts,	
for the benefit of the debtor	480

See ADVANCEMENT. AGENT. AUCTION. EVIDENCE. FINES. PERJURY. PRINTED NAME. PURCHASER. RESULTING TRUST. SALES BEFORE A MASTER.

STATUTES OF LIMITATIONS,

their operation and effect	348. 357
--------------------------------------	----------

STEWARD. See AGENT.

STEWARD OF A MANOR,

appointed for life, is not affected by a sale of the manor	240
--	-----

STOCK,

purchaser of life interest in, entitled to the first dividend	
that falls due	55

STYLE, NEW. See TIME.

SURPRISE. See AGREEMENTS. EVIDENCE.

SURRENDER,

Page.

purchaser not compellable to take a surrender of copy-
holds by attorney - - - - - 388

TENANT FOR LIFE,

may purchase the settled estates, although his consent is
required to the sale, semble - - - - - 608

See POWER.

**TENANT IN TAIL. See AGREEMENTS. ASSIGNEES OF
BANKRUPTS.****TENDER,**

conveyance must be tendered by the purchaser, where - 232

TERMS OF YEARS,

bequest of, revoked by the purchase of the fee - - 167
purchaser may require an assignment of what - - 391
cease by force of a proviso in the deed creating them, where 392
merge by an union with the fee, where - - - - 397
title to must be deduced at the expense of the vendor - 402
the expense of the assignment to attend must be borne by
the vendor or purchaser, where - - - - - 403
an assignment of may be dispensed with, where, and where
not - - - - - 404. 406
the doctrine of presuming a surrender of terms assigned
to attend the inheritance - - - - - 408. 447
an attendant term cannot be taken in execution, semble, 430, n.
a man having an actual assignment may prevail over one
having all the deeds and a declaration of trust of the
term - - - - - 405
a person having the deeds and a declaration of trust will
prevail over one having only a declarration of trust - ib.
purchaser may protect himself by a term assigned in trust
for him, against what - - - - - 448. 457
should be assigned by a separate deed where they do not
appear on the conveyance - - - - - 407
what recitals are necessary in an assignment of - - 458
shall attend the inheritance without an express declaration,
where - - - - - ib.
attendant, are not forfeited by felony, but follow an escheat, 463
are personal assets, where - - - - - 465

TERMS OF YEARS—(continued.)

Page

trustees should be satisfied of what, before they sever the
term from the inheritance - - - - 457, et seq.
an assignment of, carries notice of incumbrances on the
inheritance, where - - - - - 758

See WILL.

TESTIMONY,

whether a bill lies to perpetuate it against a purchaser, qu. 732

TIMBER,

what is considered so - - - - - 33
purchaser will be restrained from cutting, before he has
paid for the estate - - - - - 164
sold with an option, personal estate after the seller's death 178

See INTEREST.

TIME,

fixed for completing the contract is at law of the essence
of the contract - - - - - 359. 365
so in equity where either party has not shown himself
ready to perform the agreement - - - - 364
and if the vendor take no steps although in time urged
to do so, equity will not relieve him - - - 366
but a vendor will be relieved after the day appointed,
if he has not been guilty of gross negligence - 367
or the purchaser has waved the time - - - 366
is more particularly attended to in sales of reversions - 368
delays occasioned by *defects in the title* will not be a bar to
the aid of equity where the time is not material - - 369
so where no time is fixed, if no application has been
made for the title, a vendor may recover at law
although he did not obtain a title till after an action
brought - - - - - 370
but if a defective title be produced, a purchaser will
recover at law, although the vendor has a title at
the time of the trial - - - - - 370
equity will allow a vendor time to procure a title where the
purchaser at the time of the contract was aware of the
objections - - - - - 374
a dormant treaty will be enforced if the contract is not
abandoned - - - - - 376

TIME—(continued.)

Page

where by the death or bankruptcy of the purchaser the purchase money cannot be paid, the vendor may rescind the contract - - - - -	377
may be made of the essence of a contract, <i>semble</i> -	378. 382
the effect of delay where no time is appointed -	383
must be reckoned according to the new style -	126
but in a <i>parol demise</i> evidence may be admitted of the intention - - - - -	127

TITLE,

where it should be inspected before sale - - - -	12
where it is doubtful, a purchaser should not take possession	10
purchaser may take the title such as it is - - -	198
will be referred back to the master after a confirmation of his report in favour of a title, if a new fact affecting the title appear - - - - -	207
will be referred to the master before the answer, &c. where	211
rules as to reference to the master - - - -	212
if exceptions to a report in favour of the title are over-ruled, other objections cannot be taken - - -	209
<i>contra</i> , when the exceptions are allowed - - -	ib.
purchaser objecting to a title must prove it bad -	221
a vendor bringing an action, must show his title to the estate - - - - -	225
court of law can enter into equitable objections, where, and where not - - - - -	228, 229
a purchaser of an existing lease is not bound to take a new lease instead of the old one - - - -	275
a purchaser can require a title for sixty years - -	304
<i>semble</i> , that a purchaser of a lessee can require the production of the lessor's title - - - -	305. 308
a lessee cannot as plaintiff require a specific performance, without showing a good title to the freehold -	310, 311
a purchaser of a bishop's lease cannot call for the lessor's title - - - - -	312
a purchaser cannot be compelled to take a doubtful or an equitable title - - - - -	314, 315
but he will be compelled to take an equitable title where the sale was under a decree of a court of equity - - - - -	321

TITLE—(continued.)

Page

and cannot object to a title on account of a mere probability - - - - -	325
a purchaser is entitled to a fine from a vendor's wife in order to bar her dower, where, and where not -	331. 340
a purchaser is entitled to the same title from assignees of bankrupts as from vendors <i>sui juris</i> - - - - -	341
a purchaser will be compelled to take a title, although a will is not proved against the heir at law - - - - -	342
purchaser being defendant may have the title referred to the master - - - - -	207
where a purchaser takes a defective title relying on the vendor's covenants, the agreement should be recited -	470
will be held to have accepted the title, where - - - - -	213
purchaser is entitled to what relief in case the vendor cannot make a title - - - - -	218
where he has purchased a defective title - - - - -	487. 499
where he has taken a defective conveyance - - - - -	728
person joining upon a purchase to obviate an objection to the title, will not be bound unless the objection is fully stated - - - - -	726
but if a person join upon a general statement, he will be bound - - - - -	ib.
slander of - - - - -	741
sale of pretended title - - - - -	494

See ACTION. AUCTION DUTY. CONTRACT.
 DEVISEE. INCLOSURE. MORTGAGE. POWER.
 STATUTES OF LIMITATION. TIME.

TITLE-DEEDS,

execution of, need not be proved in action for breach of contract - - - - -	225
must be produced in order that the abstract may be compared with them - - - - -	387

See ATTESTED COPIES.

TREASON,

persons who have committed, can purchase, but not hold 596

TROVER. See ABSTRACT.

TRUST. See RESULTING TRUST. STATUTE OF FRAUDS.

TRUSTEES.

	Page
for payment of debts will not be restrained from selling	- 235
their receipts are discharges for purchase money, where,	
and where not - - - - -	- 525
every trustee who has accepted the trust, must join in	
the receipt, although he has released - - -	- 544
but not if he renounced - - - - -	- 545
cannot buy the trust estate - - - - -	- 595
unless they be clearly discharged from the trust	- 610
semble, that trustees for creditors cannot buy without	
the consent of all the creditors - - - - -	- 609
trustees for persons not <i>sui juris</i> cannot buy with-	
out the sanction of a court of equity - - -	- 611
purchase by a trustee, without the knowledge of his	
<i>cestui que trust</i> , may be confirmed under particular	
circumstances - - - - -	- 605
a purchaser being a relation of the trustee is imma-	
terial, unless fraud be proved - - - - -	- 606
<i>cestui que trust</i> has what remedy against a trustee who	
has sold to himself, and who may pursue the remedy	612
<i>cestui que trust</i> may bar his equity to set aside the	
purchase by laches - - - - -	- 616
or by confirmation - - - - -	- ib.
estates bought by a trustee with trust money cannot be	
followed, unless the trust appear on the deed, or the ap-	
plication of the purchase money is clearly proved -	- 638
but where a trustee is bound to buy estates, it will be	
presumed he acted in execution of the trust -	- 639
unless he considered himself entitled to the pur-	
chase money - - - - -	- ib.
may join with tenant in tail, if of age, in a recovery -	- 733
are answerable to a purchaser for a false representation as	
to incumbrances - - - - -	- 11

See HEIR AT LAW. INCUMBRANCES. INTEREST.

PURCHASE MONEY. TERMS OF YEARS.

UNREASONABLE CONSIDERATION. See CONSIDERATION.

USES, DECLARATION OF. See FINES.

USES. See CHARITABLE USES.

USURY,

what is not, upon a contract - - - - -	- 315
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